

No. 88-49-CFX
Status: GRANTED

Title: Calvin Berry, III, et al., Petitioners
v.
City of Dallas, et al.

Docketed:
June 13, 1988

Court: United States Court of Appeals
for the Fifth Circuit

Vide:
87-2012
87-2051

Counsel for petitioner: Hernandez, Frank P.

Counsel for respondent: Dippel, Kenneth C., Muncy, Analeslie

Entry	Date	Note	Proceedings and Orders
-------	------	------	------------------------

1	Jun 13 1988	G	Petition for writ of certiorari filed.
2	Jul 13 1988		Brief of respondents Dallas, Texas, et al. in opposition filed.
5	Jul 13 1988	G	Motion of Citizens For Decency Through Law, Inc. for leave to file a brief as amicus curiae in No. 87-2012 filed.
3	Jul 20 1988		DISTRIBUTED. September 26, 1988
4	Feb 21 1989		REDISTRIBUTED. February 24, 1989
6	Feb 27 1989		Motion of Citizens For Decency Through Law, Inc. for leave to file a brief as amicus curiae in No. 87-2012 GRANTED.
7	Feb 27 1989		The petition for a writ of certiorari in No. 87-2012 is granted limited to Questions I, II and III presented by the petition. The petition for a writ of certiorari in No. 87-2051 is granted limited to Questions 1 and 2 presented by the petition. The petition for a writ of certiorari in No. 88-49 is granted. The case is consolidated with 87-2012 and 87-2051, and a total of one hour is allotted for oral argument. *****
8	Mar 10 1989		Record filed.
		*	Certified original record and proceedings received, 15 volumes. (Vide: 87-2012 and 87-2051).
9	Apr 11 1989		Joint appendix filed. VIDE.
11	Apr 14 1989		Order extending time to file brief of petitioner on the merits until April 27, 1989.
12	May 1 1989		Brief of petitioners Calvin Berry, III, et al. filed.
14	Jun 5 1989		Order extending time to file brief of respondent on the merits until July 21, 1989.
15	Jul 20 1989		SET FOR ARGUMENT WEDNESDAY, OCTOBER 4, 1989. (1ST CASE)
17	Jul 20 1989		Brief amicus curiae of Children's Legal Foundation filed. VIDE.
18	Jul 20 1989		Brief of respondents City of Dallas, et al. filed. VIDE.
16	Jul 21 1989		Lodging received. (2 video tapes).
19	Jul 21 1989		Brief amici curiae of U.S. Conference of Mayors, et al. filed. VIDE.
20	Jul 27 1989		CIRCULATED.
21	Sep 26 1989		Record filed.
		*	Certified exhibits received. (Vide: 87-2012 & 87-2051).
22	Oct 4 1989		ARGUED.

①

88 - 49 4

Supreme Court, U.S.
FILED

JUN 13 1988

JOSEPH E. SPANIOLO, JR.
CLERK

No. _____

In The

Supreme Court of the United States
OCTOBER TERM, 1987

Calvin Berry, III, et al.,
Petitioner

v.

The CITY OF DALLAS, Etc., et al.,
Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

Frank P. Hernandez
(Counsel of Record)

5999 Summerside, Suite 101
Dallas, Texas, 75252
(214) 931-9444

QUESTIONS PRESENTED

1. WHETHER DALLAS CITY ORDINANCE NO. 19196, SECTIONS 41 A-2 (4), (A), (B), (C); SECTION 41 A-2 (17); (A), (B), (C), (D); SECTION 41 A-3 (1) THROUGH (9) SECTION 41 A-18 (a), (b), (c) ARE UNCONSTITUTIONAL AND VIOLATE THE FIRST, FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

2. WHETHER CITY OF DALLAS ORDINANCE NO. 19196 IS UNCONSTITUTIONAL AS AN INFRINGEMENT ON AN INDIVIDUAL'S RIGHT TO FREEDOM OF ASSOCIATION.

PARTIES

CALVIN BERRY, III, Petitioner-Plaintiff

SAUJAY PATEL, Petitioner-Plaintiff

RUDOLF FERNANDEZ, Petitioner-Plaintiff

DALLAS MOTEL ASSOCIATION, Petitioner-Plaintiff

CITY OF DALLAS, TEXAS, Respondent-Defendant

TABLE OF CONTENTS

	<i>Page</i>
Questions Presented	i
List of All Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdictional Statement	2
Applicable Constitutional Provisions	2
Statement	2
Reasons for Granting the Writ	3
Appendix A	14
Appendix B	27
Appendix C	43
Appendix D	45

TABLE OF AUTHORITIES

<i>Cases</i>	<i>Pages</i>
Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029 (5th Cir.1980), <i>Reh. den.</i> 634 F.2d 1355, reversed in part on other grounds, 102 S.Ct. 1070.....	7
E&B Enterprises v. City of University Park, 449 F.Supp. 695 (N.D. Tex., Dallas Div.,1977).....	7
Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir.1980).....	8
Gilmore v. City of Montgomery, Alabama, 94 S.Ct. 2416, 417 U.S. 556, 41 L.Ed.2d 304 (1974).....	7
Patel and Patel v. City of South San Francisco, 606 F.Supp. 666 (1985).	3, 4, 5, 6
Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir.1980).	7
United States v. O'Brien, 391 U.S. 367 (1968).	7

Supreme Court of the United States

in Equity

Celebrated by

1857

in the Court of the United States

1857

1857

1857

1857

1857

1857

TABLE OF CONTENTS

1. Introduction	1
2. Theoretical Framework	2
3. Methodology	3
4. Data Collection	4
5. Results	5
6. Discussion	6
7. Conclusion	7
8. References	8
9. Appendix	9
10. Glossary	10
11. Index	11

In The
Supreme Court of the United States

OCTOBER TERM, 1987

Calvin Berry, III, et al.,

Petitioner

v.

The CITY OF DALLAS, Etc., et al.,

Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

.....

Calvin Berry, III, Saujay Patel, Rudolf Fernandez and the Dallas Motel Association, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The judgment of the Court of Appeals was issued on February 12, 1988, affirming the judgment of the District Court. *FW/PBS, Inc. vs. City of Dallas*, 837 F.2d 1298 (Fifth Circuit 1988) (Appendix A). The judgment of the District Court was issued on September 12, 1986 granting respondent's motion for summary judgment. *Dumas vs. City of Dallas* 648 F. Supp. 1061 (N. D. Tex. 1986) (Appendix B).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 12, 1988. (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

APPLICABLE CONSTITUTIONAL PROVISIONS

The First, Fourth, Fifth, and Fourteenth Amendments of the United States Constitution pertain to this appeal.

STATEMENT

The Petitioners filed their original complaint as a civil action in the N District of Texas seeking a Temporary Restraining Order and a Permanent Injunction against Respondent, the City of Dallas, requesting that the Respondent be enjoined from enforcing the provisions of City of Dallas Ordinance No. 19196. Petitioners challenged Ordinance No. 19196 as being unconstitutional and violative of the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution. Petitioners challenged Ordinance No. 19196 as being violative of the Equal Protection clause of the United States Constitution.

Since *FW/PBS, Inc., et al v. the City of Dallas, Texas, et al*, Civil Action No. CA3-86-1759-R, had been filed prior to petitioners filing their original complaint, the Court, by Order on August 4, 1986, consolidated all of the challenges to City of Dallas Ordinance No. 19196 and, by Order of August 6, 1986, set an accelerated schedule for oral argument on all Motions For Summary Judgment for oral presentation in September and, on September 12, 1986, the District Court filed its Memorandum Opinion granting Respondent's Motion For Summary Judgement. (Appendix D)

Respondents appealed to the Fifth Circuit Court of Appeals and that portion relating to adult motels was affirmed. *FW/PBS, Inc., v. City of Dallas*, 837 F.2d 1298 (5th Cir.1988) (Appendix A)

This Court, on May 4, 1988, entered an Order In Pending Case

which granted a stay and stayed the judgment of the United States Court of Appeals for the Fifth Circuit, except for the holding that the provisions of the ordinance regulating the location of sexually-oriented businesses do not violate the Federal Constitution.

REASONS FOR GRANTING THE WRIT

A. THE CHALLENGED ORDINANCE VIOLATES THE FIRST, FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This is a case of first impression before this court. Research indicates that the case of *Putel and Patel v. City of South San Francisco*, 606 F.Supp. (N.D. Cal. 1985) is the only decision that concerns adult motels.

It is Petitioners' position that neither the District Court nor the United States Court of Appeals for the Fifth Circuit has addressed the adult motel issue in a meaningful manner. The District Court referred to the adult motel issue only in the following instances:

Dumas v. City of Dallas, 648 F. Supp. 1061, 1064 (N.D. Tex. 1986), where the Court stated:

Five members of the 15-member Commission and four of the 11 members of the council stated unequivocally -- to no dissent -- that the Ordinance was concerned solely with controlling the secondary effects of sexually-oriented businesses on surrounding neighborhoods. (Footnotes omitted)

Dumas v. City of Dallas, 648 F.Supp. 1061, 1066-67 (N.D. Tex. 1986), where the Court stated:

The plaintiffs in this case operate seven of the nine types of sexually oriented businesses classified in the ordinance: (1) adult arcades; (2) adult bookstores or adult video stores; (3) adult cabarets; (4) adult motels; (5) adult motion picture theaters; (6) adult theaters; and (7) nude model studios. There are no escort agencies or sexual encounter centers that have appeared to challenge the ordinance. (Footnote omitted)

Adult motels, for example, will be restricted to renting rooms for at least 10 hours rather than the two-hour period, now — thus cutting income by up to 80 percent.

Dumas v. City of Dallas, 648 F.Supp. 1061, 1076 (N.D. Tex.1986), where the Court stated:

The city did indeed make sufficient findings to justify restrictions on adult motels, see ante at 4 n. 9 (statement of Ms. Ragsdale), compare *df.*, *Patel and Patel vs. South San Francisco*, 606 F. Supp. 661, 671 (N.D. Cal. 1985) (no findings); moreover, recent pronouncements of state power to regulate morality and private consensual activity are probably broad enough to encompass regulations on adult motels. See *Bowers v. Hardwick*, — U.S. —, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986) (no privacy right to consensual homosexual, and, heterosexual sodomy); *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985) (en banc), *Cert. Denied*, — U.S. —, 106 S. Ct. 3338, 92 L. Ed. 2d 742 (1986) (Footnote omitted.)

The United States Court of Appeals for the Fifth Circuit had one paragraph that relates to Petitioners, when it stated in *FW/PBS, Inc., v. City of Dallas*, 837 F.2d 1298, 1304 (5th Cir. 1988) as follows:

[4] The owners of adult motels make a separate challenge to the Ordinance provision prohibiting rental of a motel room for less than ten hours at a time. The motel owners allege that the City made no finding that adult motels engender the same effects on property values and crime as do other sexually oriented businesses. Once again, however, we find the City's interest to be self-evident and substantial. It is certainly within reason that short rental periods facilitate prostitution, one of the criminal effects with which the City Council was most concerned.

These are the only references to adult motels by the District Court and the Fifth Circuit Court of Appeals.

The "sufficient findings to justify the restrictions on adult motels" cited by the District Court are contained in Respondent's Exhibit 17 (Defendant's Exhibit 17) (Attachment D), which was a Dallas City

Council meeting on June 18, 1986. The only finding, testimony, or any reference to adult motels was by City Councilwoman Ms. Ragsdale, who stated as follows:

This ordinance, particularly with respect to the motels and the proliferation of motels in the southern sector and which are in close proximity to churches, residences, as well as schools, continue to not only increase the crime but also just the neighborhood is becoming viciously angry at the presence and the ongoing presence of these given -- of these given facilities within the area. . . . It will do the following for those who have come to speak regarding the motels and most of those individuals who did come down regarding Cedar -- regarding the motel on Mouser and Cedar Crest happened to be in the district that I represent. It will do the following: Number one, motels -- motel rooms should not lease or rent for less than twelve hours. Number two, if motels are in close proximity, meaning a thousand feet within a residence or within church, within school, then over a three-year period these motels should be phased out. If they are caught--during the interim, if they are caught violating the law, of course, then their license can be revoked.

This statement by Councilwoman Ragsdale is the only evidence as relates to the adult motels and it provided for twelve-hour rental periods. The record will reflect that because American Airlines has a contract with Loews Anatole Hotel for its pilots and flight attendants to lay over in not less than ten hour increments, the challenged Ordinance was subsequently changed to the ten hour time period.

Petitioners would show that the Respondent failed to introduce any evidence of studies establishing that so-called "adult motels" either increase the incident of crime in the neighborhoods where they are located or that they contribute to urban blight or that they adversely affect property values. As stated, to date, other than *Dumas v. City of Dallas*, the only case is *Patel and Patel v. City of South San Francisco*, 606 F.Supp. 666 (N.D. Cal.1985). In the *Patel* case, the motels were equipped with T.V. sets having access to sexually explicit programs. In 1982, the City of South San Francisco enacted an ordinance similar to the one at issue in the instant case. The purposes of the South San Francisco ordinance were likewise similar to those of

the Dallas ordinance. Just as in the instant case, the City of South San Francisco ordinance failed to produce any evidence of any connection between the stated purposes of the ordinance and the regulation of the motel businesses. The District Court held the ordinance unconstitutional under the First Amendment of the United States Constitution as applied to the motels because of a lack of justification for including the so-called "adult motels" in the ordinance's definition of "adult entertainment businesses." Petitioners' motels have similar operating methods as were found in the motels in the *Patel* case. Petitioners' motels offer two hour rates, a fact which was not present in *Patel*, but there is no justification for distinguishing between motels in the City of Dallas which offer only ten-hour rates and are not regulated by the Ordinance and Petitioners' motels which are so regulated. There has been no evidence presented that the offering of two-hour rates enhances the incidence of crime, urban blight, or plummeting property values any more than a ten-hour rate would so do.

The Dallas "sexually-oriented business" ordinance is unconstitutional because it is vague and overbroad in its definitions wherein it includes the definition of an adult motel. The definition in that aspect of the Ordinance which relate to motels is found at Section 41 A-2, (4); Section 41 A-2 (17); Section 41 A-2 (19); Section 41 A-3 (4); and Section 41 A-18. (Appendix D)

It is Petitioner's contention that the Dallas Ordinance is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The activities of the motel are protected by the Fourteenth Amendment as commercial free speech, and there must be a reason for regulating one entity in a given class of motels and not regulating other entities in the same class of motels.

Petitioners contend that Section 41 A-18, in its entirety, is violative of the Fifth and Fourteenth Amendments to the United States Constitution and that said Section deprives the owners of their property without due process of law in that Section 41 A-18 restricts the public's access to motel space and unconstitutionally restricts adult activity and activity by others and access to motel space in violation of the Constitution. Section 41 A-18, in its entirety, constitutes an impermissible prior restraint and is designed and calculated to unlawfully eliminate

Petitioners' ability to conduct business and is an attempt to censor adult-oriented activities by the City of Dallas in the City of Dallas. This Section, 41A-18, is in violation of the mandate articulated in the case of *E & B Enterprises v. City of University Park*, 449 F. Supp. 695 (N.D. Tex., 1977), in that, upon information and belief, no studies of any kind were conducted by the City of Dallas regarding the necessity of enacting an ordinance of this type that seriously affects the ability of Petitioners to operate a business which is protected by the Constitution.

Petitioners contend that this Ordinance was enacted to unlawfully censor adult-oriented activity in the City of Dallas and that this Ordinance fails to pass constitutional muster in accordance with the law as mandated by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968).

B. THE CHALLENGED ORDINANCE IS AN UNCONSTITUTIONAL INFRINGEMENT ON INDIVIDUAL FREEDOM OF ASSOCIATION.

Petitioners contend that the challenged ordinance is unconstitutional as an infringement on the individual's right to freedom of association. The right to associate freely and to go "where one pleases" is a protected freedom under the First Amendment and a substantive guarantee of due process under the Fourteenth Amendment, Clause 1. *Aladdin's Castle, Inc., v. City of Mesquite*, 630 F. 2d 1029 (5th Cir. 1980), Reh. den., 634 F. 2d 1355, reversed in part on other grounds, 102 S. Ct. 1070 (1982).

Petitioners contend that the constitutional right to freely associate is not limited to those associations which are political in the customary sense but include those which pertain to the social, legal and economic benefit of the members. In this regard, the freedom of individuals of the opposite sex, or individuals of the same sex, or families with children of different sexes have the right to freely associate in a motel room owned by the Petitioners and have the right to check out within any given period of time or to stay as long or as short as they desire. See *Sawyer vs. Sandstrom*, 615 F.2d 311 (5th Cir. 1980); *Gilmore v. City of Montgomery, Alabama*, 94 S. Ct. 2416, 417 U.S. 556, 41 L. Ed. 2d 304 (1974).

Petitioners contend that the challenged Ordinance is constitutionally infirm because it is an enactment which criminalizes ordinary associational conduct not constituting a breach of the peace as recognized by the State of Texas. *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980).

CONCLUSION

Petitioners move the Court to grant the Writ of Certiorari, vacate the judgment of the Court of Appeals, and declare the City of Dallas Ordinance No. 19196, as relates to "adult motels" unconstitutional and unenforceable.

Respectfully submitted,

FRANK P. HERNANDEZ
5999 Summerside, Suite 101
Dallas, Texas, 75252
(214) 931-9444

By:

Frank P. Hernandez
Bar No. 09516000
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify the true and correct copy of the attached petition for Writ of Certiorari for petitioners on this day has been mailed to the following Attorneys of Record in this case by Certified Mail, Return Receipt Requested:

Arthur M. Schwartz
Michael W. Gross
1605 Market Street
Denver, Colorado 80202

Malcolm Dade
1025 Elm Street, Suite 700
Dallas, Texas 75202

Ralph C. Jones
Carter, Jones & McGee
2400 One Main Place
Dallas, Texas 75250

Richard L. Wilson
2650 North Federal Highway
Fort Lauderdale, Florida 33306

Mark O'Briant
Assistant City Attorney
Office of the City Attorney
Room 7D North
1500 Marilla Street
Dallas, Texas 75201

Bruce Taylor
210 Continental Plaza
11000 North Scottsdale Road
Scottsdale, Arizona 85254

Signed this _____ day of June, 1988.

Frank P. Hernandez

FW/PBS., Inc.)	
Petitioner)	
)	NO. _____
V.)	
)	
City of Dallas)	
Respondent)	

**AFFIDAVIT OF COUNSEL AS TO MAILING PETITION OF
WRIT OF CERTIORARI**

I, Frank P. Hernandez, Counsel for Calvin Berry III, et al, Petitioner, swear that the foregoing Petition was deposited in the United States mail with the proper postage, prepaid, on June _____ 1988.

Frank P. Hernandez

STATE OF TEXAS)
)
COUNTY OF DALLAS)

SWORN TO AND SUBSCRIBED before me, a notary public, by the said FRANK P. HERNANDEZ, on this the _____ day of June 1988, to certify which witness my hand and seal.

Notary Public in and for
The State of Texas

My Commission Expires:

THE STATE OF TEXAS

COUNTY OF DALLAS

BEFORE ME, the undersigned authority, on this day personally appeared _____

known to me to be the person whose name is subscribed to the foregoing instrument,

and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of _____, 19____.

Notary Public in and for the State of Texas

My commission expires this _____ day of _____, 19____.

Notary Public in and for the State of Texas

My commission expires this _____ day of _____, 19____.

Notary Public in and for the State of Texas

My commission expires this _____ day of _____, 19____.

Notary Public in and for the State of Texas

My commission expires this _____ day of _____, 19____.

Notary Public in and for the State of Texas

My commission expires this _____ day of _____, 19____.

Notary Public in and for the State of Texas

My commission expires this _____ day of _____, 19____.

Notary Public in and for the State of Texas

My commission expires this _____ day of _____, 19____.

Notary Public in and for the State of Texas

My commission expires this _____ day of _____, 19____.

Notary Public in and for the State of Texas

My commission expires this _____ day of _____, 19____.

Notary Public in and for the State of Texas

My commission expires this _____ day of _____, 19____.

Notary Public in and for the State of Texas

My commission expires this _____ day of _____, 19____.

Notary Public in and for the State of Texas

My commission expires this _____ day of _____, 19____.

Notary Public in and for the State of Texas

My commission expires this _____ day of _____, 19____.

Notary Public in and for the State of Texas

My commission expires this _____ day of _____, 19____.

Notary Public in and for the State of Texas

My commission expires this _____ day of _____, 19____.

Notary Public in and for the State of Texas

My commission expires this _____ day of _____, 19____.

APPENDICES

APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NO. 86-1723

FW/PBS, INC., Etc., et al.,

Plaintiffs-Appellants,

versus

The CITY OF DALLAS, Etc., et al.,

Defendants-Appellees.

**Appeal from the United States District Court
for the Northern District of Texas**

**Before THORNBERRY, GARWOOD and HIGGINBOTHAM, Cir-
cuit Judges.**

PATRICK E. HIGGINBOTHAM,

Circuit Judge:

In the early summer of 1986, the City of Dallas, Texas began to consider the regulation of the effects of sexually oriented businesses upon the community. After study of similar efforts by other metropolitan cities, the City Council passed a detailed ordinance that imposed licensing and zoning restrictions upon sexually oriented businesses. A variety of businesses that would be subject to its regulations attacked the Ordinance in three separate federal suits. Each of the three suits

asked the district court to enjoin enforcement of the Ordinance and declare it unconstitutional. The suits were consolidated and the case was submitted for decision on motions for summary judgment filed by all parties. The district court, with exceptions not complained of here, upheld the Ordinance in a detailed written opinion.¹

These plaintiffs appeal urging that the district court erred in two main regards. First, plaintiffs allege that the licensing provisions are content-based regulations, a prior restraint upon activity protected by the first amendment, and invalid because they lack the required procedural protections for such regulation. Second, plaintiffs complain that the court was wrong to conclude that reasonable alternative locations are available for existing businesses forced to move by the Ordinance, an inadequacy that denied their rights under the first and fourteenth amendments. Plaintiffs also make more specific attacks to the Ordinance. They urge that the licensing scheme is unconstitutional because it fails to limit the discretion of the Chief of Police, the licensing official, and because it disqualifies persons based on their criminal record.

We are not persuaded that the district court erred in its rejection of the constitutional attack and affirm. Other and more narrow attacks upon specific provisions of this ordinance were also made. We will explain these contentions and our reasons for affirming their rejection in due course.

I

The Ordinance subjects sexually oriented businesses to zoning and licensing requirements. A business must be at least 1000 feet from another sexually oriented business or a church, school, residential area, or park. Such businesses must also obtain a license issued by the Chief of Police and permit inspection of their premises when open or occupied. A license is not available to persons formerly convicted of specified crimes, such as promotion of prostitution. The ordinance also requires that viewing rooms in adult theatres be configured to allow visual surveillance by management.

1. See *Dumas v. City of Dallas*, 648 F.Supp. 1061 (N.D.Tex.1986).

The ordinance recites that its purpose is to promote health, safety and morals, and to prevent the "continued concentration of sexually oriented businesses." It disclaims any purpose to deny "access by adults to sexually oriented materials protected by the First Amendment."

The city attorney first presented the Ordinance to the Dallas City Plan Commission. The Plan Commission heard testimony from supporters as well as opponents of the Ordinance. The Commission considered studies of other cities regarding the relationship among concentrations of sexually oriented businesses, crime and property values, but did not conduct studies of Dallas itself. The Plan Commission did, however, consider a study of alternative locations within Dallas for the affected businesses. On the basis of its findings, the Plan Commission unanimously recommended that the City Council adopt the Ordinance.

The Council unanimously adopted the Ordinance after making a number of findings. It considered the same studies as well as a study conducted by the Dallas Police Department that concluded that crime rates are 90% higher in adult districts. The Council concluded that public health and safety required regulation of these businesses because they "are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature"; that there have been a substantial number of arrests for sex-related crimes near these businesses; and that the evidence that these businesses are associated with "urban blight" and declining property values is well documented.

II

We first examine the district court's exercise of jurisdiction and the standing of the plaintiffs. Seven of the nine types of sexually oriented businesses regulated by the Ordinance are represented by at least one plaintiff. These plaintiffs include adult arcades, adult bookstores, adult video stores, adult cabarets, adult motels, adult motion picture theaters, and nude model studios. Only escort agencies and sexual encounter centers are not before the court and we do not decide the constitutionality of the Ordinance as it applies to them. Nor do we decide whether the Ordinance may constitutionally reach businesses that sell

sexually-oriented reading materials or videos solely for use off the business' premises. Each of the book and video stores before us also offered on-premises consumption of sexually oriented materials.

There is no question but that this is a genuine and not a hypothetical controversy. The plaintiffs are subject to the terms of the Ordinance and obedience to its terms will limit business in ways that will result in economic loss as well as a loss of freedom to engage in acts that enjoy some measure of protection under the first amendment.

We also are not persuaded that there is a basis for abstention. There were no pending state proceedings, none have been instituted, and we are not pointed to any possible construction of the Ordinance by state courts that might make imprudent our exercise of jurisdiction.

III

[1] Plaintiffs contend that the licensing scheme must fail for several related reasons. First, they argue that insisting on a license for sexually oriented businesses regulates the content of expression protected by the first amendment without the procedural protections of *Freedman v. Maryland*,² and *Fernandes v. Limmer*.³ The ordinance is said to suffer three procedural deficiencies: it places the burden of proof upon the licensee to prove that a license was wrongfully denied; it fails to provide for prompt determination of the appeal; and it fails to provide assurance of a "prompt final judicial determination."

We are not persuaded that this ordinance requires such procedural safeguards for its validity. The argument assumes that the Ordinance licensing scheme regulates protected activity in a way that triggers the procedural requirements of *Freedman*. The ultimate issue in *Freedman* was the constitutionality of Maryland's motion picture statute. Maryland made it unlawful to distribute or exhibit films unapproved by a Board of Censors. Maryland did not provide for judicial participation or otherwise assure prompt review in its procedure although its board could bar the showing of a film. The court held that this prior

2. 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

3. 663 F.2d 619 (5th Cir. 1981), cert. dismissed, 458 U.S. 1124, 103 S.Ct. 5, 73 L.Ed.2d 1395 (1982).

restraint can avoid constitutional infirmity only if hedged by procedural safeguards designed to obviate the dangers of a censorship system. The court concluded that these safeguards include the state's shouldering of the burden of persuasion, a "procedure requiring a judicial determination..." and restriction of prior restraint to the shortest fixed period compatible with sound judicial resolution.⁴

We applied *Freedman* in *Fernandes* to strike down a regulation of the Dallas-Fort Worth Airport Authority denying followers of the Krishna religion a license to solicit at the airport. We rejected the suggestion that the regulation was sufficiently content-neutral to escape the procedural requirements of *Freedman*: "Although D/FW's regulatory ordinance purports to be content-neutral, the consequences flowing from a permit denial here are essentially the same as those addressed in *Freedman*: to an unsuccessful permit applicant, the unavoidable delay posed by judicial review is tantamount to an effective denial of First Amendment rights."⁵

A license from the airport authority was necessary in order to solicit for religious purposes in a public forum. There was no finding that the restraint of protected first amendment activity was narrowly tailored to the regulation of any untoward consequences and no findings that the protected conduct had consequences regulable by the state under its police power. Stated more directly, the airport authority was seen as controlling a religious group's access to a public forum without justification. We concluded that *Freedman*'s protections were required but absent.

In *Fernandes* we did not apply the time, place and manner analysis of *Young v. American Mini Theatres, Inc.*⁶ There the Supreme Court faced a zoning scheme similar to the Dallas Ordinance. It prohibited locating an adult theatre within 1,000 feet of any two other 'regulated uses' or within 500 feet of any residential zone. Although a majority of the Justices voted to uphold the regulation, five could not agree on a single rationale.

4. *Id.* 380 U.S. at 58-59, 85 S.Ct. at 738-39.

5. 663 F.2d at 628.

6. 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).

Four years after our decision in *Fernandes*, however, a majority of the Supreme Court settled on a time, place and manner rationale for zoning an activity that is sexually oriented but not obscene. In *City of Renton v. Playtime Theatres, Inc.*⁷ the Court reviewed a zoning ordinance enacted by Renton, Washington that prohibited adult motion picture from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or school.⁸ Characterizing the *City of Renton* ordinance as a time, place or manner restriction, the Court found the first amendment satisfied because the city had a substantial interest in regulating sexually oriented businesses and did so without restricting alternative avenues of communication.⁹

We applied *City of Renton* to a licensing scheme substantially similar to the Dallas Ordinance in *SDJ, Inc. v. City of Houston*.¹⁰ On the basis of *City of Renton*, we upheld the Houston ordinance against a facial first amendment challenge. The opponents of the Ordinance, however, made no attack to the procedural protections in the Ordinance. Nevertheless, the *City of Renton* and *City of Houston* decisions guide our analysis of the procedural protections the City of Dallas must provide here.

[2] Most important, these decisions recognize that a city may regulate the effects of sexually oriented businesses without engaging in content-based regulation. The *City of Renton* Court found no reason to apply rigorous content-based analysis where a city's "predominant concern" is to control the negative effects of a certain kind of business rather than to suppress a certain type of speech.¹¹ In addition, the court held that sexually explicit materials deserve less first amendment protection than other kinds of speech.¹² In short, to the extent that *Fernandes* reaches Dallas' present zoning regulation, it is limited by the *City of Renton* decision; the first amendment protection required for religious activity, including proselytizing and solicitation of

7. 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

8. *Id.* 106 S.Ct. at 925-27.

9. *Id.* at 930-32.

10. — F.2d —, (5th Cir. 1988).

11. *City of Renton*, 106 S.Ct. at 930.

12. *Id.* at 929-30 n. 2.

money, is of a different order than the protection due sexually oriented businesses.

We find that the Dallas Ordinance, like the Ordinance before the Court in *Renton*, regulates only the secondary effects of sexually oriented businesses. For this reason, the Ordinance need only meet the standards applicable to time, place, and manner restrictions and need not comply with *Freedman*'s more stringent limits on regulations aimed at content.

This is not to say that the lower level of protection provided in *City of Renton* inevitably excludes the procedures required by *Fernandes*. In this case, however, those procedures were not necessary insofar as the Dallas Ordinance regulates a business engaged in an activity subject only to the lesser protection. *Fernandes* procedures are less important when a regulation restricts the conduct of an ongoing commercial enterprise. What is being limited here is not a particular movie - as in *Freedman* - nor episodic solicitation efforts - as in *Fernandes* - but a long-term commercial business. The ongoing nature of the regulation provides a strong incentive for the business operators to seek review of licensing decisions, even if that review is not given immediately.¹³ We do not decide today whether *Fernandes* procedures apply to lesser-protected activities conducted outside the realm of an ongoing commercial enterprise.

We are also satisfied that the Ordinance is valid on its face. Because the Ordinance in *City of Renton* was a content-neutral time, place or manner restriction, the Supreme Court required only that it be "designed to serve a substantial government interest" and allow for "reasonable alternative avenues of communication."¹⁴ The Dallas Ordinance meets both those requirements. Like the *City of Renton* ordinance, the Dallas law was designed to serve the City's interest in maintaining "the quality of urban life."¹⁵ The City Council's consideration of the criminal effects of concentrated sexually-oriented

13. Cf. *Freedman*, 380 U.S. at 59, 85 S.Ct. at 739 (noting that "[t]he exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation").

14. *City of Renton*, 106 S.Ct. at 930.

15. *Id.* at 930.

businesses was thorough, as was its review of the effects such concentrations have on property values. In short, Dallas has demonstrated that the Ordinance furthers a substantial government interest.

The Ordinance also allows reasonable alternative avenues of communication. In *Basiardanes v. City of Galveston*,¹⁶ we held that an ordinance restricting adult theatres to locations that were "poorly lit, barren of structures suitable for showing films, and perhaps unsafe," did not provide adequate alternative location. Here, however, the City offered evidence that convinced the district court that the alternative sites are feasible locations and not just open areas on a city map. Putting aside the question of the deference the district court owed the findings of the city council regarding alternative locations, it had evidence before it sufficient to sustain its findings. Plaintiffs suggest that such findings are inappropriate for deciding a motion for summary judgment. Perhaps that is so, and we express no opinion in this regard. However, the parties submitted the case for decision on the record and the record supports the district court's findings regarding the number of alternative locations.

IV

We also are not convinced by the other constitutional attacks against the ordinance's licensing provisions. Appellants rely on several different constitutional provisions in their challenge: they attack three specific license requirements as prior restraints under the first amendment, they contend that the Ordinance's grant of discretion to the police chief violated the first amendment's prohibition on vagueness, and they argue that the Ordinance's inspection-consent provision violates the fourth amendment's limitations on searches as well as the first amendment. We deal with these attacks in turn.

A

As a threshold matter, we note that the *City of Renton* standard on review applies to the details of the licensing scheme — as opposed to the zoning rules — even though the licensing scheme may regulate aspects of the businesses' operations other than location. The kind of speech affected by the license requirements and the city's justification

16. 682 F.2d 1203, 1214 (5th Cir.1982).

for enforcing them are the same for both kinds of restrictions. Whether a license is denied because the business is improperly located or because the business is improperly maintained, the effect is the same — the operator must refrain from the activity and his only alternative is to comply with the Ordinance and obtain a license.¹⁷ Indeed, as the very title of the doctrine suggests, "time, place or manner" analysis cannot be limited solely to regulation of "place."

[3] On this basis we hold, in accordance with the prevailing view, that the first amendment does not prohibit the City of Dallas from requiring that viewing booths in adult theatres be open.¹⁸ Although this requirement is based on slightly different considerations than those that support the zoning requirements, the public purpose involved is no less substantial. The City could reasonably conclude that closed booths encourage illegal and unsanitary sexual activity in adult theatres. The substantial government interest in curbing such effects supports the open booth requirement as a valid restriction under *City of Renton* standards.

[4] The owners of adult motels make a separate challenge to the Ordinance provision prohibiting rental of a motel room for less than ten hours at a time. The motel owners allege that the City made no finding that adult motels engender the same effects on property values and crime as do other sexually oriented businesses. Once again, however, we find the City's interest to be self-evident and substantial. It is certainly within reason that short rental periods facilitate prostitution, one of the criminal effects with which the City Council was most concerned.

17. Contrary to Judge Thornberry's dissent, *see post* at 2003, *Fernandes* did not hold that a licensing scheme may never be used to implement a valid time, place or manner restriction on speech activity. Rather, *Fernandes* held that a delay in judicial review of a license denial itself impermissibly infringed on the applicant's right to speak for the duration of that delay. 663 F.2d at 628. The fact that this delay occurred in the context of licensing was not important to the court's decision. More on point is the pre-*Renton* decision, *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir.1980). There the court upheld a zoning provision scattering adult businesses pursuant to a finding by the City of Peoria that concentrations of such businesses eroded neighborhoods. Notably, *Genusa* accepted the proposition that licensing requirements be treated under the same analysis as zoning. *See id.* at 1212.

18. *See Wall Distributors, Inc. v. City of Newport News*, 782 F.2d 1165, 1169 (4th Cir.1986); *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243, 1246 (9th Cir. 1982).

[5] Appellants also attack the Ordinance provision that denies licenses to persons convicted of certain crimes.¹⁹ Arguably, it is awkward to analyze this occupational disability as a time, place or manner restriction within the *City of Renton* framework. This part of the Ordinance does not simply regulate the manner of protected activity, it denies the right of persons convicted of certain crimes to engage in the regulated businesses.

Proceeding in categorical terms sheds little light on the standard of review we should apply, although we can imagine three possibilities. First, we might subject the provision to the strict level of review reserved for content-based regulation, and require the city to show that the provision is precisely drawn to serve a compelling interest.²⁰ Second, we might apply *City of Renton's* approach and require that the provision serve a substantial government interest while leaving open alternative avenues of communication. Finally, although the provision might not be considered content-neutral, the fact that it impinges on a lesser-protected category of speech might justify the application of some intermediate standard of review, particularly when the regulation is a form of disability commonly attending convictions.

A strong argument can be made that we need not determine which standard of review is most appropriate because the provision can in any event withstand strict scrutiny; that the city's findings demonstrate a compelling interest in limiting the involvement of convicted persons in the operation of sexually oriented businesses; that by documenting the strong relationship between sexually-oriented businesses and sexually related crimes, the city established a compelling justification for barring those prone to such crimes from the management of these businesses. The argument would continue that the city's findings conform with the well-accepted notion that the government may attach to criminal convictions disabilities aimed at preventing recidivism.²¹

19. These included a variety of prostitution offenses; obscenity; sale, distribution, or display of harmful material to a minor; sexual performance by a child; possession of child pornography; public lewdness; indecent exposure; indecency with a child; sexual assault; aggravated sexual assault; and incest, solicitation of a child, or harboring a runaway child.

20. See *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 541, 100 S.Ct. 2326, 2335, 65 L.Ed.2d 319 (1980).

While compelling necessity might be a proper standard to measure regulation disabling a person with full participatory rights of citizenship, on balance we are persuaded that only a substantial relationship need be shown between the conviction and the evil sought to be prevented. The courts have not engaged in such strict scrutiny or otherwise required compelling necessity to justify other occupational bars attending a criminal conviction, including those laced with activity protected by the first amendment such as labor organizing. In short, the City need only show that conviction and the evil to be regulated bear a substantial relationship.

We agree with the district court that the Ordinance is now sufficiently well tailored to achieve its ends. Ineligibility results only from offenses that are related to the kinds of criminal activity associated with sexually oriented businesses.²² In addition, the Ordinance permits licensing of former offenders after enough time has passed to indicate they are no longer criminally inclined, and takes into account the seriousness of applicant's offenses.²³ The relationship between the offense and the evil to be regulated is direct and substantial.

This result also is consistent with our decision in *Fernandes*. The ordinance challenged in *Fernandes* denied a permit to anyone convicted of an offense involving moral turpitude. Yet, in *Fernandes* there was no immediate relationship between crimes of moral turpitude and the purpose of the airport's ordinance.²⁴

21. *Cf. De Veau v. Braisted*, 363 U.S. 144, 158-59, 80 S.Ct. 1146, 1154, 4 L.Ed.2d 1109 (1960) (plurality opinion) ("Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas."); *106 Forsyth Corp. v. Bishop*, 482 F.2d 280, 281 (5th Cir. 1973) (per curiam) (first amendment permits revocation of theatre license for violation of law against sexually explicit screenings), *cert. denied*, 422 U.S. 1044, 95 S.Ct. 2660 45 L.Ed.2d 696 (1975).

22. The district court scrutinized the list of crimes that would make an applicant ineligible for a license and invalidated those it found to have no relationship to the purpose of the Ordinance. These offenses included kidnapping, robbery, bribery, controlled substances violations, and "organized criminal activities." *Dumas*, 648 F.Supp. at 1074.

23. An individual convicted of a specified misdemeanor becomes eligible for a license two years after the conviction or end of confinement, whichever is later; for felonies or multiple misdemeanors the period is five years.

[6] We also agree with the district court that the Ordinance does not give impermissibly broad discretion to the Chief of Police in issuing, suspending, and revoking licenses. Among other things, the Ordinance empowers the Chief of Police to require "reasonably necessary" information in a license application, to deny a license for failure to comply with "applicable [health, fire and building] laws and ordinances," and to revoke a license if the licensee gave "false or misleading information" in the application or has "knowingly" permitted illegal conduct on the premises.²⁵

As these examples demonstrate, the Ordinance relies on standards that are "susceptible of objective measurement" and thus consistent with the first amendment.²⁶ The factual basis necessary for each of these determinations is either implicitly obvious, as in what constitutes "false" information or information "reasonably necessary" for an application, or ascertainable through reference to other sources of law, as in what constitutes a violation of health laws or knowledge of illegal conduct.²⁷

[7] Finally, plaintiffs attack the Ordinance provision permitting the inspection of a licensed business whenever the premises are occupied

24. See 663 F.2d at 630.

25. Although the district court left these provisions standing, the court invalidated two sections of the ordinance as unduly discretionary. One provision denied a license to applicants who have been "unable to operate or manage a sexually oriented business in a peaceful and law-abiding manner." The other permitted issuance of a license to applicants who, although previously convicted of a crime, are "presently fit to operate a sexually oriented business." See *Dumas*, 648 F.Supp. at 1072-73. The district court struck these parts from the ordinance, so they are not before us.

26. See *Keyishian v. Board of Regents*, 385 U.S. 589, 604, 87 S.Ct. 675, 684, 17 L.Ed.2d 629 (1967); *Kunz v. New York*, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951).

27. See *SDJ, Inc. v. City of Houston*, *supra* (upholding similar ordinance provision).

or open for business.²⁸ We reject the argument that this provision violates the fourth amendment prohibition against unreasonable searches. Under the administrative search doctrine, searches to enforce regulatory standards may be reasonable in light of reduced expectation of privacy in a pervasively regulated business.²⁹

Communities have long been concerned about the effects of sexually oriented businesses and have attempted to cope with those effects through regulation. Indeed, in light of this history of regulation we rejected a facial fourth amendment attack to an ordinance permitting warrantless searches of licensed massage parlors.³⁰ We hold that sexually oriented businesses face a degree of regulation that renders the inspection provision presumptively reasonable.

[8] Nor do we find the inspection provision unduly burdensome under the first amendment. The power of the city to inspect for violations does not enhance the Ordinance's suppressive effect, for the city may revoke a license only for non-compliance with substantive provisions we have determined to be consistent with *City of Renton* standards. Rather, the city has a substantial interest in enforcing the Ordinance and the inspection provision is well tailored to serve that interest.

AFFIRMED.

28. Judge Thornberry would invalidate the requirement that licensed businesses comply with the city's health, fire and building codes as a restraint of speech unrelated to the city's stated purposes. We do not reach this issue because the Appellants' only stated attack to the code-compliance requirement was that it vested too much discretion in city officials. We have dealt fully with this argument, but we will not consider others not presented to us.

29. See *United States v. Biswell*, 406 U.S. 311, 316, 92 S.Ct. 1593, 1596, 32 L.Ed.2d 87 (1972); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313, 98 S.Ct. 1816, 1820-21, 56 L.Ed.2d 305 (1978).

30. See *Pollard v. Cockrell*, 578 F.2d 1002, 1014 (5th Cir.1978).

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

CA3-86-1759-R

FW/PBS, INC., Etc., et al.,

Plaintiffs-Appellants

versus

The CITY OF DALLAS, Etc., et al.,

Defendants-Appellees.

ORDER OF JUDGMENT

Defendants' motion to dismiss is **DENIED** and their motion for summary judgment is **GRANTED**, but **DENIED** as to subsections 41A-5(a)(8), 41A-5(c), part of 41A-5(a)(10) ("under indictment"), and 41A-5(a)(10)(A)(iii), (vi)-(ix). Plaintiffs' motions are **GRANTED** only to those subsections. The City is enjoined from enforcing the subsections, and they are severed (*id.* at section 41A-23(5)). Thus limited, the Ordinance is constitutional.

Signed this 12th day of September, 1986.

/S/ Jerry Buchmeyer

United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

CA3-86-1759-R

DUMAS, Etc., et al.,

Plaintiffs-Appellants,

versus

The CITY OF DALLAS, Etc., et al.,

Respondents-Appellees

Sept. 12, 1986

MEMORANDUM OPINION (Footnotes Omitted.)

BUCHMEYER, District Judge.

The law of zoning allows the will of a majority, expressed through a representative body, to control the evolution of a community and shape its character. The law of free speech, in contrast, prevents the majority will from suppressing minority expression that the majority finds intolerable. It is perhaps inevitable that the two values should clash, when a zoning ordinance attempts to limit the freedoms of those involved in expressing unpopular views. A body of first amendment/zoning jurisprudence has thus emerged, in an attempt to reconcile this potential for conflict. Because the zoning law under attack in this case -- the recently enacted "sexually oriented business" ordinance of the City of Dallas--follows the dictates of this recent hybrid body of law, it is constitutional, except for the four minor exceptions discussed below.

I. The Ordinance

On June 12, 1986, the Dallas city attorney presented a proposed ordinance regulating sexually oriented businesses to the Dallas City Plan Commission. The Commission considered studies carried out in other cities, but did not undertake a study of Dallas. *See* Defendant's Exhibit (DX) 6 (Austin), DX 7 (Indianapolis), and DX 11 (Los Angeles). The Commission did consider, however, a map of Dallas indicating areas in which sexually oriented businesses could locate under the proposed ordinance. *See* Transcript (DX 1) at 5, 30-33. The Commission also heard public testimony, both for and against the proposed ordinance. *See id.* at 11-51. The Commission voted unanimously to recommend adoption of an ordinance regulating sexually oriented businesses.

The Ordinance went before the Dallas City Council on June 18, 1986. The Council considered the three studies that were before the Commission, *see* Transcript (DX 17) at 3. The Council also considered a Dallas study comparing crime rates in two commercial sections, one with sexually oriented businesses and one without. *See id.* at 3 (finding crime rates 90 percent higher in adult district). After hearing public comment--unanimously in favor of the ordinance--the Council adopted it by unanimous vote. *See id.* at 28. Both representative bodies were in unanimous accord on the benefits of the ordinance.

Legislative Intent. Divining the intent of a legislative body is inherently problematic, but the intent of both the Commission and the Council in adopting the Ordinance is transparently clear. Five of the 15 members of the Commission and four of the 11 members of the Council stated unequivocally--to no dissent--that the Ordinance was concerned solely with controlling the secondary effects of sexually oriented businesses on surrounding neighborhoods. Both groups stated that they were concerned not with the content of the speech associated with sexually oriented businesses, but with the crime, urban blight, and plummeting property values that inevitably seize the neighborhoods where such businesses locate. It is of no moment that the public speakers in favor of the Ordinance supported it almost singular-

ly in hopes that it would indeed suppress the speech purveyed by sexually oriented businesses, as neither the Council nor the Commission relied on the specious view that pornography "causes" various social ills and should thus be eliminated. The intent of the City in passing the Ordinance was solely to control the secondary effects of sexually oriented speech on the neighborhoods its purveyors inhabit, rather than to eliminate the speech itself.

The Council's findings. The Ordinance enacted by the City incorporated several findings. The City first found that it has authority to regulate businesses pursuant to its police power, and that licensing is a reasonable means to ensure that subject businesses comply with regulations. See Ordinance (DX 16) at 2. The Council then found that a substantial number of sexually oriented businesses require regulation to protect the "health, safety, and welfare" of the establishments' patrons and citizens in general. Public safety authorities should regulate such businesses, the Council reasoned, because the businesses "are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature" and because of the "concern over sexually transmitted disease." *Id.* The Council next found that arrests for sex-related crimes near sexually oriented businesses have been "substantial," and that there is "convincing documented evidence" that sexually oriented businesses are associated with falling property values of surrounding business and residential areas. Then, the Council found that when such businesses are located in close proximity to one another, "urban blight" and a decrease of the quality of life in adjacent areas results. Finally, the Council stated that its intent was to minimize these adverse effects, thus preserving property values in surrounding neighborhoods, deterring the spread of urban blight, and decreasing crime. *Id.* at 5. The Council emphasized, however, that it did not intend to limit access by adults to sexually oriented material protected by the first amendment. *Id.*

The Ordinance's terms. Based on these findings, the Council enacted an ordinance that pervasively regulates the operation of all sexually oriented businesses in Dallas. The most important changes made by the Ordinance, which is discussed in detail with the relevant arguments, are (1) strict locational prohibitions, including the requirement that a business be at least 1,000 feet from another sexually

oriented business, or a church, school, residential area, or park; (2) required licensing and inspection for all regulated businesses; (3) disqualification from licensure of any applicant who has been convicted of a specified crime, or whose spouse has been so convicted; (4) requirements that all patrons in an arcade — even if within a closed booth — be within the sight of a manager, and (5) various layout, furnishing, hiring, and lighting restrictions on regulated businesses.

II. The Plaintiffs

The plaintiffs in this case operate seven of the nine types of sexually oriented businesses classified in the Ordinance: (1) adult arcades; (2) adult bookstores or adult video stores; (3) adult cabarets; (4) adult motels; (5) adult motion picture theatres; (6) adult theatres; and (7) nude model studios. There are no escort agencies or sexual encounter centers that have appeared to challenge the Ordinance.

Under section 41A-13(f) of the Ordinance, each business is deemed a "nonconforming use" because of its location within 1000 feet of another sexually oriented business, or a church, school, residential district, or park. The plaintiffs may continue their business for a period of three years from June 18, 1986, unless "sooner terminated for any reason or voluntarily discontinued for a period of 30 days or more." Plaintiffs are also prohibited from "increasing, extending, or altering" their businesses unless they are changed to a conforming use. At the conclusion of the three-year period under 41A-13(f), only the "first-established and continually operating" sexually oriented business at a particular location may continue to operate—so that the dispersal of sexually oriented businesses in Dallas will be completed by June 18, 1989.

The Ordinance would force many plaintiffs to relocate. Many are near specified-use areas; others are within 1000 feet of one another—as are plaintiffs *Deja Vu*, *Texas Rose*, *Baby Dolls Saloon*, *Million Dollar Saloon II*, *Expose*, and *Bachman Cafe*. The relocation provisions threaten the businesses with enormous expenditures; many have great investments in their locations and the value of their property—such as *S.B. Sugars, Inc.*, which has obtained financing on a parking lot valued at \$1,000,000. Other plaintiffs face economic hardship from the

Ordinance's restrictions on their activities. Adult motels, for example, will be restricted to renting rooms for at least ten hours, rather than the two-hour period common now—thus cutting their income by up to 80 percent.

The main attack in this case is, therefore, the location restriction and the three-year amortization period of section 41A-13(f). Plaintiffs also level attacks against each provision of the Ordinance that applies to them, claiming that the Ordinance's provisions are vague and overbroad, that its licensure requirement is unconstitutional, that it vests overbroad discretion in the Chief of Police, and that the Ordinance is not sufficiently related to the City's objectives.

III. Standing

[1] As a threshold issue, the City makes the argument—apparently one considered obligatory in cases such as this—that various defendants have no standing to challenge the Ordinance. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S.Ct. 1660, 1666, 75 L.Ed.2d 675 (1983); *Brown v. Edwards*, 721 F.2d 1442, 1446-47 (5th Cir.1984). Moreover, the City claims that the plaintiffs' challenges are not ripe, because there is no "real and immediate threat" of closure of their businesses. Plaintiffs do not, however, present "abstract" questions of possible injuries. There is no doubt that the Ordinance, once effective, would pervasively change the manner in which each plaintiff runs his or her business; many would close. "It is clear that a party may challenge a licensing statute regardless of whether he or she was denied a permit, or whether one has ever been sought." *Fernandes v. Limmer*, 663 F.2d 619, 625 (5th Cir.1981); see also *Star Satellite, Inc., v. City of Biloxi*, 779 F.2d 1074, 1078 (5th Cir.1986); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151, 89 S.Ct. 935, 938, 22 L.Ed.2d 162 (1969). The City's position amounts to a claim that plaintiffs' attacks could be asserted as a defense to an eventual state prosecution for defiance of the Ordinance. Such a forum would not, however, protect plaintiffs' rights. See *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) (defense in state suit "will not assure adequate vindication of constitutional rights... a substantial loss of or impairment of freedoms of expression will occur if appellants must await the state court's disposition"); *Steffel v.*

Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 1697, 36 L.Ed.2d 488 (1973); *Gerstein v. Pugh*, 420 U.S. 103, 108 n. 9, 95 S.Ct. 854, 860 n. 9, 43 L.Ed.2d 54 (1975). No state prosecution is underway, and the complete determination of plaintiffs' claims here will aid and expediate the City's efforts, rather than delaying and hindering them. Cf. *Huffman v. Pursue Ltd.*, 420 U.S. 592, 604-05, 95 S.Ct. 1200, 1208, 43 L.Ed.2d 482 (1975); *Trainor v. Hernandez*, 431 U.S. 434, 446 & n. 8, 97 S.Ct. 1911, 1919 & n. 8, 52 L.Ed.2d 486 (1977). Under the factual allegations presented, plaintiffs do have standing to challenge the Ordinance and their challenge is ripe for determination.

IV. Constitutionality

[2,3] Regardless of the Ordinance's focus on the secondary effects of sexually oriented businesses, there is no doubt that its terms have an incidental impact on expression that is protected by the first amendment. Because of this impact, it is appropriate to analyze the statute under the four-part test of *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968). See *City of Renton v. Playtime Theatres, Inc.*, — U.S. —, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Young v. American Mini Theatres*, 427 U.S. 50, 79, 96 S.Ct. 2440, 2456, 49 L.Ed.2d 310 (1976) (Powell, J., concurring). Under the *O'Brien* test, regulation is justified despite its impact on first amendment interests "[1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on ... first amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679. Incidental burdens on free expression may be analyzed under this test as time, place, and manner regulations. *Renton*, 106, S.Ct. at 927. The first three elements may be considered without reference to the specific requirements of the Ordinance; a determination of whether the Ordinance's particular terms follow the least restrictive means available must, however, be made independently for each of the Ordinance's restrictions.

First, it is without doubt that the police power of the City encom-

passes the power to enact a zoning and a regulatory ordinance such as that considered here. *See ante* at 1063 n. 1; *see also Renton*, 106 S.Ct. at 927 (similar ordinance within police power). Second, the interests the City studied and intended to further by the Ordinance—crime control, protection of property values, and prevention of urban blight, *see ante* at 1064 & nn.8-9—are both important and substantial. *See Young*, 427 U.S. at 79, 96 S.Ct. at 2456 (Powell, J., concurring). Third, the intent of the City—garnered from complete reports of both the Plan Commission and City Council proceedings—demonstrates that the governmental interest was unrelated to the suppression of free expression. *See ante* at 1064-65 nn. 8-10. The legislative response to the secondary effects of sexually oriented businesses evinced a clear intent to leave alternative avenues open for expression of that genre, while lessening the effects of such businesses on the surrounding community. The first three elements of the *O'Brien* test are satisfied; evaluation of the fourth factor requires reference to each challenged section of the Ordinance.

[4] *Locational restrictions.* The element of the Ordinance that is most vigorously challenged is the one element that is least susceptible to challenge after *Young* and *Renton*. Section 41A-13 states that a sexually oriented business cannot be located within 1000 feet of (1) a church; (2) a public or private elementary or secondary school; (3) a boundary of a residential district; (4) a public park adjacent to a residential district; (5) the property line of a lot devoted to a residential use; or (6) another sexually oriented business. If a regulated business is currently in violation of the section, it is deemed a nonconforming use and allowed to continue to operate for three years. A properly located regulated business is not rendered a nonconforming use by the subsequent location of a church, school, park, or residential area within 1000 feet of the business.

No doubt remains after *Renton* and *Young* that dispersed zoning of sexually oriented businesses is permissible, provided that "reasonable alternative avenues of communication" exist. *See Renton*, 106 S.Ct. at 928; *See also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75-6, 101 S.Ct. 2176, 2186, 68 L.Ed.2d 671 (1981); *Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972). In *Young*, a Detroit zoning plan similar to that challenged here

was approved, but "[t]he situation would have been quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." *Id.* 427 U.S. at 71 n. 35, 96 S.Ct. at 2453 n. 35; accord, *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1214 (5th Cir.1982)(only "oppressive options remained to an aspiring promoter of adult films"); *Olmos Realty Co. v. State*, 693 S.W.2d 711,714 (Tex.Civ.App.—San Antonio, no writ); *Keego Harbor Co. v. Keego Harbor*, 657 F.2d 94 (6th Cir.1981)(ordinance prohibited all theatres); *Alexander v. City of Minneapolis*, 698 F.2d 936, 937-38 (8th Cir.1983) (ordinance led to closing all theatres); *Purple Onion, Inc., v. Jacksonville*, 511 F.Supp 1207, 1217 (N.D.Ga.1981)(sites either "unavailable, unusable, or so inaccessible to the public [that] they amount to no locations"); *Renton*, 106 S.Ct. at 938, 54 U.S.L.W. at 4167 (Brennan, J., dissenting)(must have "reasonable opportunity to operate"). The majority opinion in *Renton*, however, has made it clear that there need be only a "reasonable opportunity to locate within the city; the Court expressly rejected findings of fact that the 520 acres left open by the ordinance was not truly "available" for regulated use.

The land available for sexually oriented businesses under the Dallas ordinance is substantial, and satisfies *Basiardanes* and *Renton*. The maps considered by the City upon enacting the Ordinance detail several areas that are open to sexually oriented businesses, and it cannot be said that a "reasonable" opportunity for such businesses does not exist under the Ordinance. The plan adopted by Dallas differs markedly from the Galveston plan rejected in *Basiardanes*, 682, F.2d at 1214; that plan incorporated an outright ban on 85-90 percent of the city's total area, and the remaining areas, located "among warehouses, shipyards, undeveloped areas, and swamps," were reached by "few access roads." *Id.* The Dallas plan, in contrast, permits location in several areas stretching from the inner city area to the north and south suburbs, accessed by such major thoroughfares as Interstate 35, Interstate 30, Loop 12, Highway 183, and Harry Hines Boulevard. Eight to ten percent of the city's total area—21,000 acres—is available. *Cf. Renton*, 106 S.Ct. at 930 (5 percent). See DX 15; PX 1; DX 27. There is no impediment to the locational restrictions enacted in the Ordinance.

[5] The three-year amortization clause is also challenged. Such clauses, however, are uniformly upheld. See *Hart Bookstores v. Edmisten*, 612 F.2d 821, 830 (4th Cir.1979), *cert. denied*, 447 U.S. 929,

100 S.Ct. 3028, 65 L.Ed.2d 1124 (1980)(upholding six-month amortization period); *Northend Cinema, Inc. v. Seattle*, 90 Wash.2d 709, 585, P.2d 1153, 1160 (1978), cert. denied sub nom. *Apple Theater v. Seattle*, 441 U.S. 946, 99 S.Ct. 2166, 60 L.Ed.2d 1048 (1979)(upholding three-month amortization period); see also Note, *Using Constitutional Zoning to Neutralize Adult Entertainment--Detroit to New York*, 5 *Fordham Urban L.J.* 455, 472-74 (1977)(advocating one-year amortization period); *SDJ, Inc. v. City of Houston*, 636 F.Supp. 1359, 1371 (S.D. Tex.1986) (six-month period). See generally *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935, 940-43 (Tex.Civ.App.--Amarillo, writ ref'd n.r.e.). The period allowed by the Ordinance is more generous than others that have been upheld; it is a valid mechanism used to enforce valid locational regulations.

Licensure requirement. Although there is no constitutional impediment to the concept of requiring sexually oriented businesses to obtain licenses and pay reasonable fees, plaintiffs challenge the manner in which the licensing scheme is implemented and the qualifications the scheme imposes upon licensees. The challenge is sustained only as to subsections 41A-5(a)(8), 41A-5(a)(10)(B)(c), part of 41A-5(a)(10) and 41A-5(10)(A)(iii) and (vi)-(ix); the City will be enjoined from enforcing those sections, which may be easily severed from the remainder of the Ordinance.

[6] It is settled constitutional principle that any license requirement for an activity related to expression must contain narrow, objective, and definite standards to guide the licensing authority. See *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51, 89 S.Ct. 935, 938, 22 L.Ed.2d 162 (1969); *Saia v. New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948). The City argues that the Ordinance vests no discretion in the Chief of Police, as it states that he "shall" approve the issuance of a license "unless" a factual basis for denial exists. This assertion is largely correct, but it is a simplistic view of the actual operation of two subsections of the Ordinance. First, section 41A-5(a)(8) allows the police chief to deny a license to an applicant who has been employed in a sexually oriented business on a finding that "he is *unable* to operate or manage a sexually oriented business premises in a *peaceful* and law-abiding manner" (emphasis added). Second, the Ordinance allows an applicant with a past conviction to

be granted a license if the sufficient amount of time has elapsed, but section 41A-5(c) allows the police chief to grant a license to such an applicant "only if the chief of police determines that the applicant or applicant's spouse is *presently fit* to operate a sexually oriented business" (emphasis added). Neither section provides sufficiently definite standards to pass constitutional muster.

Both sections ask the police chief to make subjective judgments on the fitness of an applicant; neither, then, is controlled by standards "susceptible of objective measurement." *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04, 87 S.Ct. 675, 683-84, 17 L.Ed.2d 629 (1967). The Ordinance is more specific in addressing the "present fitness" of an applicant with a past conviction; in at least one case, however, the specificity itself constitutes overbroad discretion—one factor the police chief is to take into account is "the amount of time that has elapsed since his last criminal activity." See subsection 41A-5(c)(3). Under this subsection, then, the police chief is permitted to extend indefinitely the periods specifically enumerated by the Ordinance in subsection 41A-5(a)(10)(B)(i-iii). By reference to the "extent and nature" of the applicant's past criminal activity, *id.* at 41A-5(c)(1), the applicant's age at the time of the offense, *id.* at 41A-5(c)(2), the applicant's "conduct and work activity," *id.* at 41A-5(c)(4), evidence of the applicant's "rehabilitation," *id.* at 41A-5(c)(5), and letters "from prosecution, law enforcement, and correctional officers," *id.* at 41A-5(c)(6), then, the police chief may determine that an applicant will not be granted a license. These two subsections vest unfettered discretion in the police chief, and cannot survive constitutional scrutiny.

Shorn of the two sections that vest subjective and unguided authority in the police chief, however, the largest part of the licensure section is constitutional. The findings the police chief must make in licensing sexually oriented businesses are based on objectively determinable facts, and are thus permissible. See *Memet v. State*, 642 S.W.2d 518, 524 (Tex.Civ.App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.); *Schope v. State*, 647 S.W.2d 675, 680 (Tex.Civ.App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.). Age restrictions are factually based, see subsection 41A-5(a)(1), as are determinations of past due fees and taxes, see *id.* at 41A-5(a)(2), and false statements on application forms,

see *id.* at 41A-5(a)(3), see *Schope*, 647 S.W.2d at 680 (upholding ordinance including such factors); *Bayside Enterprises v. Carson*, 470 F. Supp. 1140, 1148, (M.D.Fla.1979)(upholding unpaid tax or fee provision); *Genusa*, 619 F.2d at 1219-20 (upholding provision for false statements). Failure to comply with the Ordinance, subsections 41A-5(a)(4) and (9), may be objectively verified, as may approval of premises by health, fire, and building officials, subsection 41A-5(a)(6). See *SDJ, Inc. v. City of Houston*, 636 F.Supp. at 1368-69 (S.D.Tex.1986). Whether an applicant resides with someone who has been recently denied a license or whose license has been revoked, subsection 41A-5(1)(5), may be objectively verified. Finally, although this Court agrees that "persons with prior criminal records are not first amendment outcasts," *Fernandes v. Limner*, 663 F.2d 619, 630 (5th Cir.1981), cert. dismissed, 458 U.S. 1124, 103 S.Ct. 5, 73 L.Ed.2d 1395 (1982), denial of licensure to those convicted of certain specified crimes that are related to the crime-control intent of the law is undoubtedly permitted.

[7] Five enumerated crimes, however, are not sufficiently related to the purpose of the Ordinance to withstand scrutiny. Although thirteen of the offenses are clearly related to the purpose of the Ordinance as it was debated by the City, no findings exist to justify prohibiting one convicted of (1)a controlled substances act violation, (2)bribery, (3)robbery, (4)kidnapping, or (5)organized criminal activity from obtaining a license to operate a sexually oriented business. In the absence of such findings, this Court cannot say that the offenses enumerated are sufficiently related to the purpose of the Ordinance—either for constitutional purposes, or for purposes of the City's authority under Texas law. See *Young*, 427 U.S. 50, 56 n. 11, 96 S.Ct. 2440, 2445 n. 11; see also *Tex.Civ.Stat.Ann.* art. 6252-13c (supp.1986) (denial of license proper only if crime "directly relates to an occupation."). Subsections 41A-5(a)(10)(A)(iii), (vi) (vii), and (ix) are thus constitutionally and statutorily invalid.

[8] The language of subsection 41A-5(a)(10) that compels the police chief to deny licensure to an applicant "under indictment or misdemeanor information" for a specified crime must also fail. Although the City undoubtedly has a legitimate interest in preventing one convicted of a specified crime from holding a license, see *ante* at 1073

and n. 34, denial on the basis of mere indictment or information cannot pass constitutional scrutiny. An indictment or information is not evidence of an applicant's guilt, but merely indicates that an *ex parte* procedure navigated solely by a prosecutor has resulted in a finding of probable cause. See *United States v. Calandra*, 414 U.S. 338, 344-45, 94 S.Ct. 613, 618 38 L.Ed.2d 561 (1974). The simple act of indictment or information cannot carry the heavy burden implicit in suppressing speech that is protected by the first amendment, and may implicate overbreadth in chilling protected speech. Dispositively, however, the prohibition against licensure of one under indictment or information fails the fourth *O'Brien* test in that less restrictive means of accomplishing the legislative goal exist. If the City intends to forestall revocation procedures against one who is eventually convicted of a specified crime by denying a license to an applicant under indictment, it may easily accomplish this purpose by amending to defer decision for a limited period of time on an application to see if an adjudication of guilt has been made during this period—requiring denial and subsequent reapplication is both inefficient, see Posner, *Economic Analysis of the Law*, *passim* (1972) (duplicative expending of administrative and legal resources), and constitutionally infirm.

Plaintiffs also attack various procedural aspects of the licensure system, including the appeal process, under *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). Primary to their contention is their claim that "no judicial review is provided for." This assertion, however, is entirely meritless. Although no provision for judicial review is made, "none is needed. One denied a permit may seek a hearing, appeal that hearing, and then turn to courts of law." *Memet*, 642 S.W.2d at 524; see also *Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977); *Harper v. Lindsay*, 616 F.2d 849, 858 (5th Cir.1980). The appeal, revocation, and suspension provisions are replete with procedural protections and reviewable standards, and comport with *Freedman* and fundamental tenets of due process.

Definitions. Vagueness challenges are imposed against the various definitions and terms utilized in the Ordinance. All terms used, however, are designed to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute,"

Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1971), in light of common understanding and practices. *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1971). Indeed, the language of many provisions has been taken from ordinances upheld by the Supreme Court, see *Young*, 427 U.S. at 53, 96 S.Ct. at 2244 ("specified sexual activities" and "specific sexual anatomical areas"); *City of Renton*, 106 S.Ct. at 927 ("primary purpose"). Other elements of the Ordinance have been upheld by the courts. See *Hart Bookstores v. Edmisten*, 612 F.2d 821, 833 (4th Cir.1979), *cert. denied*, 447 U.S. 929, 100 S.Ct. 3028, 65 L.Ed.2d 1124 (1980) ("distinguished or characterized by"; *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) ("depicting or describing"); *Hart Bookstores*, 612 F.2d at 834 ("adult bookstore"); *Stansberry v. Holmes*, 613 F.2d 1285, 1290 (5th Cir. 1980) ("major business," similar to "principal business purpose" used in Ordinance); *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1210 (5th Cir. 1982) ("regularly" features); *Northend Cinema, Inc. v. Seattle*, 90 Wash.2d 709, 585 F.2d 1153 (1978), *cert. denied sub nom. Apple Theatre v. Seattle*, 441 U.S. 946, 99 S.Ct. 2166, 60 L.Ed.2d 1048 (1979) ("adult theatre"); *15192 Thirteen Mile Road, Inc. v. City of Warren*, 626 F.Supp. 803, 808 (E.D.Mich.1985) ("escort agency"); *SDJ, Inc. V. City of Houston*, 636 F.Supp. at 1364 (topless bars). There is no constitutional impediment to the phraseology of the Ordinance.

Internal restrictions. The Ordinance requires various internal restrictions of regulated businesses--from major renovations in the design of adult arcades to the allowance of sofas in nude modeling studios. While such intrusions into the internal design of regulated businesses may seem unduly restrictive, they have consistently been upheld. See *Wall Distributors, Inc. v. City of Newport News*, 782 F.2d 1165, 1169 (4th Cir.1986) (requiring closed viewing booths to be within view of management "falls within the broad general limits of the police power" and satisfies *O'Brien*); *Ellwest Stereo Theatres v. Wenner*, 681 F.2d 1243, 1246 (9th Cir.1982) (same); *EWAP, Inc. v. City of Los Angeles*, 97 Cal.App.3d 179, 158 Cal.Rptr. 579 (1979) (same); *Purple Onion, Inc. v. Jackson*, 511 F.Supp. 1207, 1227 (N.D.Ga. 1981) (nude modeling studios may be pervasively regulated, as they contain no element of "expression"); *Upper Midwest Book-*

sellers v. City of Minneapolis, 780 F.2d 1389 (8th Cir.1985) (display to minors); *Pollard v. Cockrell*, 578 F.2d 1002, 1013 (5th Cir.1978) (permissible to distinguish between "legitimate" and regulated use of nude models). The City did indeed make sufficient findings to justify restrictions on adult motels, *see ante* at 4 n. 9 (statement of Ms. Ragsdale), *cf. Patel & Patel v. South San Francisco*, 606 F.Supp. 666, 671 (N.D.Cal.1985) (no findings); moreover, recent pronouncements of state power to regulate morality and private consensual sexual activity are probably broad enough to encompass regulation on adult motels. *See Bowers v. Hardwick*, —U.S.—, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) (no privacy right to consensual homosexual, and, arguably, heterosexual sodomy); *Baker v. Wade*, 769 F.2d 289 (5th Cir.1985) (*en banc*), *cert. denied*, —U.S.—, 106 S.Ct. 3338, 92 L.Ed.2d 742 (1986). As the City has made the requisite findings, the various restrictions on the operation, layout, design, and furnishing of regulated businesses must be upheld. *See Young*, 427 U.S. at 56 nn. 11-12, 96 S.Ct. at 2445 nn. 11-12.

Summary. Only the four subsections described above—41A-5(a)(8), 41A-5(c), the "under indictment or information" language of 41A-5(a)(10), and the five unrelated crimes of 41A-5(a)(10)—fail to satisfy the fourth prong of the *O'Brien* test. The ordinance is thus constitutional, with the above minor exceptions—which are severable, *see* section 41A-23(5), and may be cured by amendment.

V. Conclusion

Efforts to restrict the accessibility of sexually oriented speech have long been part of Western legal tradition, as has the principle that expression should be free and unfettered. The reconciliation of the competing values implicit in these two longstanding concepts inevitably shifts over time, in response to technological change and evolving conceptions of the legality of legislating majoritarian conceptions of morality. Restrictions in the place and manner of sexually oriented expression through zoning regulation is the most recent jurisprudential attempt to allow majority community structure to coexist with minority expression; the sexually oriented business ordinance enacted by the City follows the substantive dictates of this body of law, and must be upheld.

APPENDIX C

DALLAS CITY COUNCIL MEETING
June 18, 1986

**Excerpt from Testimony Concerning Proposed Dallas City Ordinance
Regulating Sexually Oriented Businesses. (DX 17)**

(page 23)

MS. RAGSDALE: Well, I want to say a few words at this time. I think it's absolutely necessary for the passage of this ordinance for several reasons, not only because of the -- the moral question, but also we all have a civic responsibility to those who we are (page 24) supposed to serve.

This ordinance, particularly with respect to the motels and the proliferation of motels in the southern sector and which are in close proximity to churches, residences, as well as schools, continue to not only increase the crime but also just the neighborhood is becoming viciously angry at the presence and the ongoing presence of these given -- of these given facilities within the area.

I should hope that, not only should we pass it but we should be -- take this issue very seriously and also move to other measures to address the whole issue of motels in the southern sector with respect to heavy zoning which even allows these types of things to be located so close to residential areas.

In some areas these motels would have never been established in the first place, but because we have this overwhelming zoning which allows anything to be located there, we find motels literally across the street from houses, literally, certainly much less than a thousand feet.

Although I am not completely satisfied, but I must admit that I am glad that we have taken this step. It will do the following for those who have come to speak regarding the motels, and most of those individuals (page 25) who did come down regarding Cedar — regarding the motel on Mouser and Cedar Crest happened to be in the district that I represent. It will do the following: Number one, motels — motel rooms should not lease or rent for less than twelve hours. Number two, if motels are in close proximity, meaning a thousand feet within a residence or within church, within school, then over a three-year period these motels should be phased out. If they are caught — during the interim, if they are caught violating the law, of course, then their license can be revoked.

I know I talked to some earlier, and of course this was not to their complete satisfaction, but I must admit I think we've taken a very strong, progressive step.

APPENDIX D**CITY OF DALLAS ORDINANCE NO. 19136
Enacted June 18, 1986**

An ordinance amending the Dallas City Code, as amended, by adding CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES" to be comprised of Sections 41A-1 through 41A-23; repealing Sections 31-24 and 31-26 of the Dallas City Code; providing definitions; providing for licensing and regulation of sexually oriented businesses; regulating the location of sexually oriented businesses; providing for enforcement; providing a penalty not to exceed \$1000 for certain offenses, and designating certain other offenses as class B misdemeanors; providing a severability clause; and providing an effective date.

WHEREAS, the city council makes the following findings with regard to sexually oriented establishments:

(1) Article 1175, Section 23, of the Revised Civil Statutes of Texas authorizes home rule cities to license any lawful business, occupation, or calling that is susceptible to the control of the police power.

(2) Article 1175, Section 34, of the Revised Civil Statutes of Texas authorizes home rule cities to enforce all ordinances necessary to protect health, life, and property, and to preserve the good government, order and security of such cities and their inhabitants.

(3) There are a substantial number of sexually oriented businesses

in the city that require special supervision from the public safety agencies of the city in order to protect and preserve the health, safety, and welfare of the patrons of such businesses as well as the citizens of the city.

(4) The city council finds that sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature.

(5) The city council further finds that the city police have made a substantial number of arrests for sexually related crimes in sexually oriented business establishments.

(6) The concern over sexually transmitted diseases is a legitimate health concern of the city which demands reasonable regulation of sexually oriented businesses in order to protect the health and well-being of the citizens.

(7) Licensing is a legitimate and reasonable means of accountability to ensure that operators of sexually oriented businesses comply with reasonable regulations and to ensure that operators do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation.

(8) There is convincing documented evidence that sexually oriented businesses, because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values.

(9) It is recognized that sexually oriented businesses, due to their nature have serious objectionable operational characteristics particularly when they are located in close proximity to each other, thereby contributing to urban blight and downgrading the quality of life in the adjacent areas.

(10) The city council desires to minimize and control these adverse effects and thereby preserve the property values and character of surrounding neighborhoods, deter the spread of urban blight, protect the citizens from increased crime, preserve the quality of life, and protect the health, safety, and welfare of the citizenry; and

WHEREAS, the city council makes the following findings with regard to the licensing of sexually oriented business establishments:

(1) The city council believes it is in the interest of the public safety and welfare to prohibit persons convicted of certain crimes from engaging in the occupation of operating a sexually oriented business.

(2) The city council, in accordance with Article 6252-13c of Vernon's Texas Civil Statutes, has considered the following criteria:

(a) the nature and seriousness of the crimes;

(b) the relationship of the crimes to the purposes for requiring a license to engage in the occupation;

(c) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and

(d) the relationship of the crimes to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of the licensed occupation; and has determined that the crimes listed in Sections 41A-5(a)(10) of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as set forth in this ordinance, are serious crimes which are directly related to the duties and responsibilities of the occupation of operating a sexually oriented business. The city council has further determined that the very nature of the occupation of operating a sexually oriented business brings a person into constant contact with persons interested in sexually oriented materials and activities thereby giving the person repeated opportunities to commit offenses against public order and decency or crimes against the public health, safety, or morals should he be so inclined. Thus, it is the opinion for the city council that the listed crimes render a person unable, incompetent, and unfit to perform the duties and responsibilities accompanying the operation of a sexually oriented business in a manner that would promote the public safety and trust.

(3) The city council has determined that no person who has been convicted of a crime listed in Section 41A-5(a)(10), as set forth in this ordinance, is presently fit to operate a sexually oriented business until the respective time periods designated in that section have expired.

(4) It is the intent of the city council to disqualify a person from being issued a sexually oriented business license by the city of Dallas

if he is currently under indictment or misdemeanor information for, or has been convicted within the designated time period of, any of the crimes listed in Section 41A-5(a)(10), as set forth in this ordinance; NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That the Dallas City Code, as amended, is amended by adding Chapter 41A, "SEXUALLY ORIENTED BUSINESSES," to read as follows:

CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES"

SEC. 41A-1. PURPOSE AND INTENT.

(a) It is the purpose of this chapter to regulate sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access to distributors and exhibitors of sexually oriented entertainment to their intended market.

(b) It is the intent of the city council that the locational regulations of Section 41A-13 of this chapter are promulgated pursuant to Article 2372w, Revised Civil Statutes of Texas, as they apply to nude model studios and sexual encounter centers only. It is the intent of the city council that all other provisions of this chapter are promulgated pursuant to the Dallas City Charter and Article 1175, Revised Civil Statutes of Texas.

SEC. 41A-2. DEFINITIONS.

In this chapter:

(1) ADULT ARCADE means any place to which the public is

permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing of "specified sexual activities" or "specified anatomical areas."

(2) **ADULT BOOKSTORE or ADULT VIDEO STORE** means a commercial establishment which as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following:

(A) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which depict or describe "specified sexual activities" or "specified anatomical areas";
or

(B) instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities."

(3) **ADULT CABARET** means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:

(A) persons who appear in a state of nudity; or

(B) live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or

(C) films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

(4) **ADULT MOTEL** means a hotel, motel, or similar commercial establishment which:

(A) offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; and has a sign visible from the public right of way which ad-

vertises the availability of this adult type of photographic reproductions; or

(B) offers a sleeping room for rent for a period of time that is less than 10 hours; or

(C) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than 10 hours.

(5) **ADULT MOTION PICTURE THEATER** means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

(6) **ADULT THEATER** means a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities."

(7) **CHIEF OF POLICE** means the chief of police of the city of Dallas or his designated agent.

(8) **ESCORT** means a person who, for consideration, agrees or offers to act as a companion, guide, or date for another person, or who agrees or offers to privately perform a striptease for another person.

(9) **ESCORT AGENCY** means a person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes, for a fee, tip, or other consideration.

(10) **ESTABLISHMENT** means and includes any of the following:

(A) the opening or commencement of any sexually oriented business as a new business;

(B) the conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;

(C) the addition of any sexually oriented business to any other existing sexually oriented business; or

(D) the relocation of any sexually oriented business.

(11) **LICENSEE** means a person in whose name a license to operate a sexually oriented business has been issued, as well as the individual listed as an applicant on the application for a license.

(12) **NUDE MODEL STUDIO** means any place where a person who appears in a state of nudity or displays "specified anatomical areas" is provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration.

(13) **NUDITY** or a **STATE OF NUDITY** means the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast.

(14) **PERSON** means an individual, proprietorship, partnership, corporation, association, or other legal entity.

(15) **SEMI-NUDE** means a state of dress in which clothing covers no more than the genitals, pubic region, and areolae of the female breast, as well as portions of the body covered by supporting straps or devices.

(16) **SEXUAL ENCOUNTER CENTER** means a business or commercial enterprise that, as one of its primary business purposes, offers for any form of consideration:

(A) physical contact in the form of wrestling or tumbling between persons of the opposite sex; or

(B) activities between male and female persons and/or persons of the same sex when one or more of the persons is in a state of nudity or semi-nude.

(17) **SEXUALLY ORIENTED BUSINESS** means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center.

(18) **SPECIFIED ANATOMICAL AREAS** means human genitals in a state of sexual arousal.

(19) **SPECIFIED SEXUAL ACTIVITIES** means and included any of the following:

(A) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;

(B) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;

(C) masturbation, actual or simulated; or

(D) excretory functions as part of or in connection with any of the activities set forth in (A) through (C) above.

(20) **SUBSTANTIAL ENLARGEMENT** of a sexually oriented business means the increase in floor area occupied by the business by more than 25 percent, as the floor area exists on June 18, 1986.

(21) **TRANSFER OF OWNERSHIP OR CONTROL** of a sexually oriented business means and includes any of the following:

(A) the sale, lease, or sublease of the business;

(B) the transfer of securities which constitute a controlling interest in the business, whether by sale, exchange, or similar means; or

(C) the establishment of a trust, gift, or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control.

SEC. 41A-3. CLASSIFICATION.

Sexually oriented businesses are classified as follows:

(1) adult arcades;

(2) adult bookstores or adult video stores;

(3) adult cabarets;

(4) adult motels;

(5) adult motion picture theaters;

(6) adult theaters;

(7) escort agencies;

(8) nude model studios; and

(9) sexual encounter centers.

SEC 41A-4. LICENSE REQUIRED.

(a) A person commits an offense if he operates a sexually oriented business without a valid license, issued by the city for the particular type of business.

(b) An application for a license must be made on a form provided by the chief of police. The application must be accompanied by a sketch or diagram showing the configuration of the premises, including a statement of total floor space occupied by the business. The sketch or diagram need not be professionally prepared but must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six inches. Applicants who must comply with Section 41A-19 of this chapter shall submit a diagram meeting the requirements of Section 41A-19.

(c) The applicant must be qualified according to the provisions of this chapter and the premises must be inspected and found to be in compliance with the law by the health department, fire department, and building official.

(d) If a person who wishes to operate a sexually oriented business is an individual, he must sign the application for a license as applicant. If a person who wishes to operate a sexually oriented business is other than an individual, each individual who has a 20 percent or greater interest in the business must sign the application for a license as applicant. Each applicant must be qualified under Section 41A-5 and each applicant shall be considered a licensee if a license is granted.

(e) The fact that a person possesses a valid theater license, dance hall license, or public house of amusement license does not exempt him from the requirement of obtaining a sexually oriented business license. A person who operates a sexually oriented business and possesses a theater license, public house of amusement license or dance hall license shall comply with the requirements and provisions of this chapter as well as the requirements and provisions of Chapter 46 and Chapter 14 of this code when applicable.

SEC. 41A-5. ISSUANCE OF LICENSE.

(a) The chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:

- (1) An applicant is under 18 years of age.
- (2) An applicant or an applicant's spouse is overdue in his pay-

ment to the city of taxes, fees, fines, or penalties assessed against him or imposed upon him in relation to a sexually oriented business.

(3) An applicant has failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form.

(4) An applicant or an applicant's spouse has been convicted of a violation of a provision of this chapter, other than the offense of operating a sexually oriented business without a license, within two years immediately preceding the application. The fact that a conviction is being appealed shall have no effect.

(5) An applicant is residing with a person who has been denied a license by the city to operate a sexually oriented business within the preceding 12 months, or residing with a person whose license to operate a sexually oriented business has been revoked within the preceding 12 months.

(6) The premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances.

(7) The license fee required by this chapter has not been paid.

(8) An applicant has been employed in a sexually oriented business in a managerial capacity within the preceding 12 months and has demonstrated that he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner.

(9) An applicant or the proposed establishment is in violation of or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19 or 41A-20.

(10) An applicant or an applicant's spouse has been convicted of or is under indictment or misdemeanor information for a crime:

(A) involving:

(i) any of the following offenses as described in Chapter 43 of the Texas Penal Code:

(aa) prostitution;

(bb) promotion of prostitution;

(cc) aggravated promotion of prostitution;
 (dd) compelling prostitution;
 (ee) obscenity;
 (ff) sale, distribution, or display of harmful material to minor;

(gg) sexual performance by a child;
 (hh) possession of child pornography;
 (ii) any of the following offenses as described in Chapter 21 of the Texas Penal Code.

(aa) public lewdness;
 (bb) indecent exposure;
 (cc) indecency with a child;

(iii) engaging in organized criminal activity as described in Chapter 71 of the Texas Penal Code;

(iv) sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;

(v) incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code;

(vi) kidnapping or aggravated kidnapping as described in Chapter 20 of the Texas Penal Code;

(vii) robbery or aggravated robbery as described in Chapter 29 of the Texas Penal Code;

(viii) bribery or retaliation as described in Chapter 36 of the Texas Penal Code;

(ix) a violation of the Texas Controlled Substances Act or Dangerous Drugs Act punishable as a felony, Class A misdemeanor, or Class B misdemeanor; or

(x) criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;

(B) for which:

(i) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the con-

viction, whichever is the later date, if the conviction is of misdemeanor offense;

(ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or

(iii) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemeanor offenses or combination of misdemeanor offenses occurring within any 24-month period.

(b) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or applicant's spouse.

(c) An applicant who has been convicted or whose spouse has been convicted of an offense listed in Subsection (a)(10), for which the required time period has elapsed since the date of conviction or the date of release from confinement imposed for the conviction, may qualify for a sexually oriented business license only if the chief of police determines that the applicant or applicant's spouse is presently fit to operate a sexually oriented business. In determining present fitness under this section, the chief of police shall consider the following factors concerning the applicant or applicant's spouse, whichever had the criminal conviction:

(1) the extent and nature of his past criminal activity;

(2) his age at the time of the commission of the crime;

(3) the amount of time that has elapsed since his last criminal activity;

(4) his conduct and work activity prior to and following the criminal activity;

(5) evidence of his rehabilitation or rehabilitative effort while incarcerated or following release; and

(6) other evidence of his present fitness, including letters of recommendation from prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for him; the sheriff and chief of police in the community where he resides; and any other persons in contact with him.

(d) It is the responsibility of the applicant, to the extent possible, to secure and provide to the chief of police the evidence required to determine present fitness under Subsection (c) of this section.

(e) The license, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, and the address of the sexually oriented business. The license shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time.

SEC. 41A-6. FEES.

(a) The annual fee for a sexually oriented business license is \$500.

(b) If an applicant is required by this code to also obtain a dance hall license or public house of amusement license for the business at a single location, payment of the fee for the sexually oriented business license exempts the applicant from payment of the fees for the dance hall or public house of amusement licenses.

SEC. 41A-7. INSPECTION.

(a) An applicant or licensee shall permit representatives of the police department, health department, fire department, housing and neighborhood services department, and building inspection division to inspect the premises of a sexually oriented business for the purpose of insuring compliance with the law, at any time it is occupied or open for business.

(b) A person who operates a sexually oriented business for his agent or employee commits an offense if he refuses to permit a lawful inspection of the premises by a representative of the police department at any time it is occupied or open for business.

SEC. 41A-8. EXPIRATION OF LICENSE.

(a) Each license shall expire one year from the date of issuance and may be renewed only by making application as provided in Section 41A-4. Application for renewal should be made at least 30 days before the expiration date, and when made less than 30 days before the expiration date, the expiration of the license will not be affected.

(b) When the chief of police denies renewal of a license, the ap-

plicant shall not be issued a license for one year from the date of denial. If, subsequent to denial, the chief of police finds that the basis for denial of the renewal license has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date denial became final.

SEC. 41A-9. SUSPENSION.

The chief of police shall suspend a license for a period not to exceed 30 days if he determines that a licensee or an employee of licensee has:

(1) violated or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19, or 41A-20 of this chapter;

(2) engaged in excessive use of alcoholic beverages while on the sexually oriented business premises;

(3) refused to allow an inspection of the sexually oriented business premises as authorized by this chapter;

(4) knowingly permitted gambling by any person on the sexually oriented business premises;

(5) demonstrated inability to operate or manage a sexually oriented business in a peaceful and law-abiding manner thus necessitating action by law enforcement officers.

SEC. 41A-10. REVOCATION.

(a) The chief of police shall revoke a license if a cause of suspension in Section 41A-9 occurs and the license has been suspended within the preceding 12 months.

(b) The chief of police shall revoke a license if he determines that:

(1) a licensee gave false or misleading information in the material submitted to the chief of police during the application process;

(2) a licensee or an employee has knowingly allowed possession, use, or sale of controlled substances on the premises;

(3) a licensee or an employee has knowingly allowed prostitution on the premises;

(4) a licensee or an employee knowingly operated the sexually oriented business during a period of time when the licensee's license

was suspended;

(5) a licensee has been convicted of an offense listed in Section 41A-5(a)(10)(A) for which the time period required in Section 41A-5(a)(10)(B) has not elapsed;

(6) on two or more occasions within a 12-month period, a person or persons committed an offense occurring in or on the licensed premises of a crime listed in Section 41A-5(a)(10)(A), for which a conviction has been obtained, and the person or persons were employees of the sexually oriented business at the time the offenses were committed;

(7) a licensee or an employee has knowingly allowed any act of sexual intercourse, sodomy, oral copulation, masturbation, or sexual contact to occur in or on the licensed premises. The term "sexual contact" shall have the same meaning as it is defined in Section 21.01, Texas Penal Code; or

(8) a licensee is delinquent in payment to the city for hotel occupancy taxes, ad valorem taxes, or sales taxes related to the sexually oriented business.

(c) The fact that a conviction is being appealed shall have no effect on the revocation of the license.

(d) Subsection (b)(7) does not apply to adult motels as a ground for revoking the license.

(e) When the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a sexually oriented business license for one year from the date revocation became effective. If, subsequent to revocation, the chief of police finds that the basis for the revocation has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date the revocation became effective. If the license was revoked under Subsection (b)(5), an applicant may not be granted another license until the appropriate number of years required under Section 41A-5(a)(10)(B) has elapsed since the termination of any sentence, parole, or probation.

SECTION 41A-11. APPEAL.

If the chief of police denies the issuance of a license, or suspends

or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action and the right to an appeal. The aggrieved party may appeal the decision of the chief of police to a permit and license appeal board in accordance with Section 2-96 of this code. The filing of an appeal stays the action of the chief of police in suspending or revoking a license until the permit and license appeal board makes a final decision. If within a 10 day period the chief of police suspends, revokes, or denies issuance of a dance hall license or public house of amusement license for the same location involved in the chief's actions on the sexually oriented business license, then the chief may consolidate the requests for appeals of those actions into one appeal.

SEC. 41A-12. TRANSFER OF LICENSE.

A licensee shall not transfer his license to another, nor shall a licensee operate a sexually oriented business under the authority of a license at any place other than the address designated in the application.

SEC. 41A-13. LOCATION OF SEXUALLY ORIENTED BUSINESSES.

(a) A person commits an offense if he operates or causes to be operated a sexually oriented business within 1,000 feet of:

- (1) a church;
- (2) a public or private elementary or secondary school;
- (3) a boundary of a residential district as defined by the Dallas Development Code;
- (4) a public park adjacent to a residential district as defined by the Dallas Development Code; or
- (5) the property line of a lot devoted to residential use.

(b) A person commits an offense if he causes or permits the operation, establishment, substantial enlargement, or transfer of ownership or control of a sexually oriented business.

(c) A person commits an offense if he causes or permits the operation, establishment, or maintenance of more than one sexually oriented business in the same building, structure, or portion thereof, or the increase of floor area of any sexually oriented business in any building.

structure, or portion thereof containing another sexually oriented business.

(d) For the purposes of Subsection (a), measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises where a sexually oriented business is conducted, to the nearest property line of the premises of a church or public or private elementary or secondary school, or to the nearest boundary of an affected public park, residential district, or residential lot.

(e) For purposes of Subsection (b) of this section, the distance between any two sexually oriented businesses shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which each business is located.

(f) Any sexually oriented business lawfully operating on June 18, 1986, that is in violation of Subsections (a), (b), or (c) of this section shall be deemed a nonconforming use. The nonconforming use will be permitted to continue for a period not to exceed three years, unless sooner terminated for any reason or voluntarily discontinued for a period of 30 days or more. Such nonconforming uses shall not be increased, enlarged, extended or altered except that the use may be changed to a conforming use. If two or more sexually oriented businesses are within 1,000 feet of one another and otherwise in a permissible location, the sexually oriented business which was first established and continually operating at a particular location is the conforming use and the later-established business(es) is nonconforming.

(g) A sexually oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the location, subsequent to the grant or renewal of the sexually oriented business license, of a church, public or private elementary or secondary school, public park, residential district, or residential lot within 1000 feet of the sexually oriented business. This provision applies only to the renewal of a valid license, and does not apply when an application for a license is submitted after a license has expired or has been revoked.

SEC. 41A-14. EXEMPTION FROM LOCATION RESTRICTIONS.

(a) If the chief of police denies the issuance of a license to an ap-

plicant because the location of the sexually oriented business establishment is in violation of Section 41A-13 of this chapter, then the applicant may, not later than 10 calendar days after receiving notice of the denial, file with the city secretary a written request for an exemption from the locational restrictions of Section 41A-13.

(b) If the written request is filed with the city secretary within the 10-day limit, a permit and license appeal board, selected in accordance with Section 2-95 of this code, shall consider the request. The city secretary shall set a date for the hearing within 60 days from the date the written request is received.

(c) A hearing by the board may proceed if at least two of the board members are present. The board shall hear and consider evidence offered by any interested person. The formal rules of evidence do not apply.

(d) The permit and license appeal board may, in its discretion, grant an exemption from the locational restrictions of Section 41A-13 if it makes the following findings:

(1) That the location of the proposed sexually oriented business will not have a detrimental effect on nearby properties or be contrary to the public safety or welfare;

(2) That the granting of the exemption will not violate the spirit and intent of this chapter of the city code;

(3) That the location of the proposed sexually oriented business will not downgrade the property values or quality of life in the adjacent areas or encourage the development of urban blight;

(4) That the location of an additional sexually oriented business in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any efforts of urban renewal or restoration; and

(5) That all other applicable provisions of this chapter will be observed.

(e) The board shall grant or deny the exemption by a majority vote. Failure to reach a majority vote shall result in denial of the exemption. Disputes of fact shall be decided on the basis of a preponderance of the evidence. The decision of the permit and license appeal board is final.

(f) If the board grants the exemption, the exemption is valid for one year from the date of the board's action. Upon the expiration of an exemption, the sexually oriented business is in violation of the locational restrictions of Section 41A-13 until the applicant applies for and receives another exemption.

(g) If the board denies the exemption, the applicant may not re-apply for an exemption until at least 12 months have elapsed since the date of the board's action.

(h) The grant of an exemption does not exempt the applicant from any other provisions of this chapter other than the locational restrictions of Section 41A-13.

SEC. 41A-15. ADDITIONAL REGULATIONS FOR ESCORT AGENCIES.

(a) An escort agency shall not employ any person under the age of 18 years.

(b) A person commits an offense if he acts as an escort or agrees to act as an escort for any person under the age of 18 years.

SEC. 41A-16. ADDITIONAL REGULATIONS FOR NUDE MODEL STUDIOS.

(a) A nude model studio shall not employ any person under the age of 18 years.

(b) A person under the age of 18 years commits an offense if he appears in a state of nudity in or on the premises of a nude model studio. It is a defense to prosecution under this subsection if the person under 18 years was in a restroom not open to public view or persons of the opposite sex.

(c) A person commits an offense if he appears in a state of nudity or knowingly allows another to appear in a state of nudity in an area of a nude model studio premises which can be viewed from the public right of way.

(d) A nude model studio shall not place or permit a bed, sofa, or mattress in any room on the premises, except that a sofa may be placed in a reception room open to the public.

SEC. 41A-17. ADDITIONAL REGULATIONS FOR ADULT THEATERS AND ADULT MOTION PICTURE THEATERS.

(a) The requirements and provisions of Chapter 46 of this code remain applicable to adult theaters and adult motion picture theaters.

(b) A person commits an offense if he knowingly allows a person under the age of 18 years to appear in a state of nudity in or on the premises of an adult theater or adult motion picture theater.

(c) A person under the age of 18 years commits an offense if he knowingly appears in a state of nudity in or on the premises of an adult theater or adult motion picture theater.

(d) It is a defense to prosecution under Subsections (b) and (c) of this section if the person under 18 years was in a restroom not open to public view or persons of the opposite sex.

SEC. 41A-18. ADDITIONAL REGULATIONS FOR ADULT MOTELS.

(a) Evidence that a sleeping room in a hotel, motel, or similar commercial establishment has been rented and vacated two or more times in a period of time that is less than 10 hours creates a rebuttable presumption that the establishment is an adult motel as that term is defined in this chapter.

(b) A person commits an offense if, as the person in control of a sleeping room in a hotel, or motel, or similar commercial establishment that does not have a sexually oriented business license, he rents or subrents a sleeping room to a person and, within 10 hours from the time the room is rented, he rents or subrents the same sleeping room again.

(c) For purposes of subsection (b) of this section, the terms "rent" or "subrent" mean the act of permitting a room to be occupied for any form of consideration.

SEC. 41A-19. REGULATIONS PERTAINING TO EXHIBITION OF SEXUALLY EXPLICIT FILMS OR VIDEOS.

(a) A person who operates or causes to be operated a sexually oriented business, other than an adult motel, which exhibits on the

premises in a viewing room of less than 150 square feet of floor space, a film, video cassette, or other video reproduction which depicts specified sexual activities or specified anatomical areas, shall comply with the following requirements:

(1) Upon application for a sexually oriented business license, the application shall be accompanied by a diagram of the premises showing a plan thereof specifying the location of one or more manager's stations and the location of all overhead lighting fixtures and designating any portion of the premises in which patrons will not be permitted. A manager's station may not exceed thirty-two (32) square feet of floor area. The diagram shall also designate the place at which the permit will be conspicuously posted, if granted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however each diagram should be oriented to the north or to some designated street or object and should be drawn to a designated scale or with marked dimensions sufficient to show the various internal dimensions of all areas of the interior of the premises to an accuracy of plus or minus six inches. The chief of police may waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the configuration of the premises has not been altered since it was prepared.

(2) The application shall be sworn to be true and correct by the applicant.

(3) No alteration in the configuration or location of a manager's station may be made without the prior approval of the chief of police or his designee.

(4) It is the duty of the owners and operator of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.

(5) The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of every area of the premises to which any patron is permitted access for any purposes excluding restrooms. Restrooms may not contain video reproduction equipment. If the premises has two or more manager's stations designated, then the interior of the premises shall be con-

figured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose from at least one of the manager's stations. The view required in this subsection must be by direct line of sight from the manager's station.

(6) It shall be the duty of the owners and operator, and it shall also be the duty of any agents and employees present in the premises to ensure that the view area specified in Subsection (5) remains unobstructed by any doors, wall, merchandise, display racks or other materials at all times that any patron is present in the premises and to ensure that no patron is permitted access to any area in which patrons will not be permitted in the application filed pursuant to Subsection (1) of this section.

(7) The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than one (1.0) foot-candle as measured at the floor level.

(8) It shall be the duty of the owners and operator and it shall also be the duty of any agents and employees present in the premises to ensure that the illumination described above, is maintained at all times that any patron is present in the premises.

(b) A person having a duty under Subsections (1) through (8) of Subsection (a) above commits an offense if he knowingly fails to fulfill that duty.

SEC. 41A-20. DISPLAY OF SEXUALLY EXPLICIT MATERIAL TO MINORS.

(a) A person commits an offense if, in a business establishment open to persons under the age of 17 years, he displays a book, pamphlet, newspaper, magazine, film, or video cassette, the cover of which depicts, in a manner calculated to arouse sexual lust or passion for commercial gain or to exploit sexual lust or perversion for commercial gain, any of the following:

- (1) human sexual intercourse, masturbation, or sodomy;
- (2) fondling or other erotic touching of human genitals, pubic region, buttocks, or female breasts;
- (3) less than completely and opaquely covered human genitals,

buttocks, or that portion of the female breast below the top of the areola; or

(4) human male genitals in a discernibly turgid state, whether covered or uncovered.

(b) In this section "display" means to locate an item in such a manner that, without obtaining assistance from an employee of the business establishment:

(1) it is available to the general public for handling and inspection; or

(2) the cover or outside packaging on the item is visible to members of the general public.

SEC. 41A-21. ENFORCEMENT.

(a) Except as provided by Subsection (b), any person violating Section 41A-13 of this chapter, upon conviction, is punishable by a fine not to exceed \$1,000.

(b) If the sexually oriented business involved is a nude model studio or sexual encounter center, then violation of Section 41A-4(a) or 41A-13 of this chapter is punishable as a Class B misdemeanor.

(c) Except as provided by Subsection (b) any person violating a provision of this chapter other than Section 41A-13, upon conviction, is punishable by a fine not to exceed \$200.

(d) It is a defense to prosecution under Section 41A-4(a), 41A-13, or 41A-16(d) that a person appearing in a state of nudity did so in a modeling class operated:

(1) by a proprietary school licensed by the state of Texas; a college, junior college, or university supported entirely or partly by taxation;

(2) by a private college or university which maintains and operates educational programs in which credits are transferrable to a college, junior college, or university supported entirely or partly by taxation; or

(3) in a structure:

(A) which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available

for viewing; and

(B) where in order to participate in a class a student must enroll at least three days in advance of the class;

(C) where no more than one nude model is on the premises at any one time.

(e) It is a defense to prosecution under Section 41A-4(a) or Section 41A-13 that each item of descriptive, printed, film, or video material offered for sale or rental, taken as a whole, contains serious literary, artistic, political, or scientific value.

SEC. 41A-22. INJUNCTION.

A person who operates or causes to be operated a sexually oriented business without a valid license or in violation of Section 41A-13 of this chapter is subject to a suit for injunction as well as prosecution for criminal violations.

SEC. 41A-23. AMENDMENT OF THIS CHAPTER.

Sections 41A-13 and 41A-14 of this chapter may be amended only after compliance with the procedure required to amend a zoning ordinance. Other sections of this chapter may be amended by vote of the city council.

SECTION 2. That Section 31-24, "Prohibiting Display of Sexually Explicit Material to Minors," of CHAPTER 31, "OFFENSES-MISCELLANEOUS," of the Dallas City Code, as amended, is repealed.

SECTION 3. That Section 31-26, "Prohibiting Operation of Certain Enterprises in Specified Areas," of CHAPTER 31, "OFFENSES-MISCELLANEOUS," of the Dallas City Code, as amended, is repealed.

SECTION 4. That Resolution Number 86-1010, adopted by the City Council March 26, 1986, imposing a moratorium on building permits and certificates of occupancy, is repealed.

SECTION 5. That the terms and provisions of this ordinance are severable and are governed by Section 1-4 of CHAPTER 1 of the Dallas City Code, as amended.

SECTION 6. That all persons required by this chapter to obtain a

sexually oriented business license are hereby granted a grace period, beginning June 18, 1986, and ending July 18, 1986, in which to make application for the license.

SECTION 7. That this ordinance shall take effect immediately from and after its passage and publication in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so ordained.

APPROVED AS TO FORM:

ANALESLIE MUNCY, City Attorney

By

/s/ Mark K. O'Briant

Assistant City Attorney

Passed and correctly enrolled June 18, 1986

(2)

Supreme Court, Texas
FILED

JUL 13 1988

JOSEPH E. SPANIOLO, JR.
CLERK

NO. 88-49

In The
Supreme Court Of The United States
OCTOBER TERM, 1988

CALVIN BERRY, *et al*,
Petitioners,
vs.

THE CITY OF DALLAS, TEXAS, *et al*,
Respondents.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

RESPONDENTS' BRIEF IN OPPOSITION

CARROLL R. GRAHAM
Counsel of Record

MARK K. O'BRIANT
Assistant City Attorney

OFFICE OF THE CITY ATTORNEY
7BN City Hall
1500 Marilla Street
Dallas, Texas 75201
(214) 670-3510

Attorneys for Respondents

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENTS SUPPORTING DENIAL OF THE WRIT	3
The Petition Raises No Substantial Constitutional Issue	3
CONCLUSION	8
APPENDIX A	A-1

TABLE OF AUTHORITIES

Cases	Page
<i>City of Renton v. Playtime Theatres, Inc.</i> , 475 U.S. 41, 106 S. Ct. 925, 89 L.Ed.2d 29 (1986)	4, 6
<i>Dumas v. City of Dallas</i> , 648 F.Supp. 1061 (N.D. Tex. 1986)	2, 3, 4, 5
<i>FW/PBS, Inc. v. City of Dallas</i> 837 F.2d 1298 (5th Cir. 1988)	2, 3, 6
<i>Patel and Patel v. City of South San Francisco</i> , 606 F.Supp. 666 (N.D. Cal. 1985)	5
<i>Pollard v. Cockrell</i> , 578 F.2d 1002 (5th Cir. 1978)	7
<i>Young v. American Mini-Theatres Inc.</i> , 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976)	6, 7
Statutes And Ordinances	
Dallas City Code, Chapter 41A (enacted as Ordinance 19196)	
Section 41A-2	2, 3
Section 41A-13	2
Section 41A-18	6
Dallas City Ordinance No. 19377 (amending Chapter 41A)	2

NO. 88-49

In The
Supreme Court Of The United States
OCTOBER TERM, 1988

CALVIN BERRY, *et al*,
Petitioners,
vs.

THE CITY OF DALLAS, TEXAS, *et al*,
Respondents.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent City of Dallas is not satisfied with Petitioners' statement of the case and offers the following by way of clarification.

After considering the studies of other metropolitan cities on the effects of sexually oriented businesses upon neighborhoods, as well as its own crime rate study, the City of Dallas enacted a Sexually Oriented Business Ordinance, codified as Chapter 41A of the Dallas City Code.¹ The ordinance regulates sexually oriented businesses in two basic ways: zoning restrictions and a license requirement.

¹The Ordinance as originally passed is contained in Appendix D of the Petition for Certiorari.

The zoning provisions prohibit adult businesses from locating within 1000 feet of a church, school, residential area, public park adjacent to a residential area, or another sexually oriented business. Businesses located within 1000 feet of one of the prohibited areas are given a three-year amortization period if they were already operating on the effective date of the Ordinance.²

Immediately after passage of the Ordinance, a variety of adult entertainment establishments attacked its constitutionality in three separate federal suits, one of which was brought by Petitioners. Petitioners in this case are owners of motels which permit rooms to be rented for two-hour periods. Pet. at 6. They are thus classified by the Ordinance as "adult motels."³ The Ordinance does not prohibit motels from renting rooms by the hour. It simply classifies those who do so as "adult motels" and makes them subject to the zoning restrictions of the Ordinance.

Each of the three suits sought declaratory and injunctive relief. The suits were consolidated and the case was submitted for decision on cross-motions for summary judgment filed by all parties. No party objected to resolution of the issues by summary judgment.⁴

The District Court upheld the constitutionality of the Ordinance, with the exception of four relatively minor provisions dealing with licensing. *Dumas v. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986). These sections were later amended or deleted to comport with the Court's ruling.⁵

²Section 41A-13, Dallas City Code.

³Section 41A-2(4), Dallas City Code.

⁴See *FW/PBS v. City of Dallas*, 837 F.2d 1298, 1303 (5th Cir. 1988), and *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1064 n. 5, and 1068 n. 17 (N.D. Tex. 1986).

⁵See Ordinance 19377, enacted October 12, 1986, included herein as Appendix A.

The District Court made a number of significant findings. First, the Court found that the Ordinance was content-neutral, focusing on the secondary effects of sexually oriented businesses and having only an incidental impact on protected speech, and that it satisfied the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968). Second, the Court found that the land available for the relocation of existing businesses and the establishment of new businesses was substantial, constituting 8-10% of the City's total area.⁶ The Court further found that the Ordinance's three-year amortization period was generous and constituted "... a valid mechanism used to enforce valid locational regulations."⁷ The Court upheld all provisions of the Ordinance dealing with adult motels.

The Fifth Circuit upheld the District Court decision in all respects. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988).

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

The Petition Raises No Substantial Constitutional Issue

The Dallas Sexually Oriented Business Ordinance includes "adult motels" among the regulated uses subject to zoning restrictions.

Adult motels are primarily defined as those which offer rooms for rental for periods of less than ten hours.⁸ The City Council of Dallas found that the rental of motel rooms on an hourly basis facilitates prostitution, and that the motels in Dallas renting rooms for short periods of time are

⁶*Dumas v. City of Dallas*, 648 F.Supp. 1061, 1070-71 (N.D. Tex. 1986).

⁷*Id.* at 1071.

⁸Section 41A-2(4), Dallas City Code.

associated with prostitution and contribute to neighborhood deterioration. (DX 17). This finding was upheld by the District Court.⁹

Petitioners are owners of adult motels which offer rooms for rental in two-hour increments. Pet. at 6. Petitioners' brief offers several grounds of error, none of which merit review by this Court.

First, Petitioners complain that the City of Dallas conducted no new studies prior to enacting the Ordinance. Pet. at 7. Petitioners' argument is controlled squarely by *City of Renton v. Playtime Theatres, Inc.*¹⁰ In reviewing a similar zoning ordinance regulating the location of sexually oriented businesses, this Court rejected the notion that a City must conduct its own studies before enacting an ordinance, stating

The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies on is *reasonably believed to be relevant* to the problem that the city addresses. *City of Renton v. Playtime Theatres, Inc.*, 89 L.Ed.2d at 40 (1986) (emphasis added).

The City of Dallas did in fact rely upon evidence pertaining to adult motels in its consideration of the Ordinance. In addition to the public testimony received by the City Council (DX 17), the Council considered a study conducted by the City of Los Angeles (DX 11) which included adult motels. The City of Dallas was entitled to rely upon the experience and studies of other cities it believed to be

⁹*Dumas v. City of Dallas*, 648 F.Supp. 1061, 1076 (N.D. Tex. 1986).

¹⁰475 U.S. 41, 106 S.Ct. 425, 89 L.Ed.2d 29 (1986).

relevant to the problems generated by adult motels, and the District Court found the City's reliance to be supported by the record.

Petitioners cite a pre-*Renton* case, *Patel and Patel v. City of South San Francisco*, 606 F.Supp 666 (N.D. Cal. 1985), which is easily distinguishable. The district court in that case found that not only had the city failed to conduct its own study, it did not consider or introduce into the record the studies of *any other city* dealing with adult motels prior to passing its ordinance. *Patel and Patel*, 606 F.Supp. at 671-72.¹¹

Next, Petitioners assert that the Ordinance is unconstitutional for a variety of reasons, each of which is unsupported by adequate explanation or citation of authority. The allegation is made that the Ordinance's definition of "adult motel" is vague and overbroad (Pet. at 6), yet the argument proceeds no further, and no authority is cited. Respondents are unable to respond to the allegation without further clarification. The District Court upheld all definitions in the Ordinance against vagueness challenges.¹²

The same defect is found in the allegation that the Ordinance as applied to adult motels constitutes a prior restraint and is "an attempt to censor adult-oriented activities . . ." Pet. at 6-7. Since motels do not disseminate First Amendment materials, it is unknown what speech is allegedly being suppressed by the City, and Petitioners offer no illumination. There is also no explanation as to what "adult-oriented activities" are being censored. The Ordinance does not regulate consensual activity within motels.

¹¹Also, the definition of "adult motel" in the *Patel* ordinance differs markedly from that of the Dallas ordinance.

¹²*Dumas v. City of Dallas*, 648 F.Supp. at 1075-76.

Similarly, the allegation is made that the Ordinance deprives adult motel owners of property without Due Process of law but fails to adequately explain or cite legal authority. The Ordinance does not prohibit motels from renting rooms by the hour.¹³ It simply defines those who do as "adult motels" and makes them subject to the same types of locational restrictions as were upheld in *Young v. American Mini-Theatres, Inc.*,¹⁴ and *City of Renton*.

Petitioners also assert that the Ordinance violates the Equal Protection Clause because it does not apply to *all* motels but only to those which rent rooms for periods less than ten hours. This Court held in *Young v. American Mini-Theatres* that a city may treat sexually oriented businesses differently because they have "markedly different effects upon their surroundings."¹⁵ Even in the area of protected expression, the government may tailor its reaction to different messages according to the degree to which its interests are implicated.¹⁶

The City's interest here is substantial, as noted by the Fifth Circuit:

Once again . . . we find the City's interest to be self-evident and substantial. It is certainly within reason that short rental periods facilitate prostitution, one of the criminal effects with which the City Council was most concerned. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d at 1304.

The high incidence of prostitution at motels permitting rooms to be rented for only two hours, like those of Petitioners, justifies the differing treatment. The reasoning of

¹³Section 41A-18(b) creates an offense for *unlicensed* motels to rent rooms in increments of less than ten hours.

¹⁴427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).

¹⁵*Young*, 427 U.S. at 82 n. 6 (Powell, J. concurring)

¹⁶*Id.*

Young v. American Mini-Theaters applies with even greater force to commercial establishments which do not disseminate First Amendment materials, such as adult motels. Petitioners have shown no Equal Protection violation.¹⁷

Last, Petitioners assert that the Ordinance is an unconstitutional "infringement on the individual's right to freedom of association." Pet. at 7. The only illumination given on this point is the statement that individuals "have the right to freely associate in a motel room owned by the Petitioners and have the right to check out within any given period of time or to stay as long or as short as they desire." Pet. at 7.

This statement is puzzling to Respondents since the Ordinance makes no restriction on who may patronize an adult motel and does not regulate activities within a motel room. Similarly, the Ordinance makes no restrictions on "the right to check out" at any given time, if such a right exists. Petitioners' charge of infringement on the right of freedom of association is a bare allegation, unsupported by fact or law.

¹⁷See also *Pollard v. Cockrell*, 578 F.2d 1002, 1013 (5th Cir. 1978) (City may exempt from a massage parlor ordinance institutions like hospitals which are unlikely to serve as subterfuges for prostitution).

CONCLUSION

The Petition for Writ of Certiorari raises no substantial constitutional issue and should be denied by this Court.

Dated: July 12, 1988

Respectfully submitted,

OFFICE OF THE CITY ATTORNEY
CITY OF DALLAS, TEXAS
7BN City Hall
1500 Marilla Street
Dallas, Texas 75201
(214) 670-3510

By Carroll R. Graham
CARROLL R. GRAHAM
Counsel of Record
State Bar of Texas
No. 08257000

By Mark K. O'Briant
MARK K. O'BRIANT
Assistant City Attorney
State Bar of Texas
No. 15165700

Attorneys for Respondents

APPENDIX A

ORDINANCE NO. 19377

An ordinance amending Sections 41A-2, 41A-5, 41A-7, 41A-10, and 41A-13 of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended; amending definitions; adding definitions of "residential district" and "residential use"; amending provisions dealing with the issuance of licenses for sexually oriented businesses; amending inspection provisions; amending revocation provisions; providing a penalty not to exceed \$1,000; providing a saving clause; providing a severability clause; and providing an effective date.

WHEREAS, the city plan commission and the city council, in accordance with the provisions of state law and the applicable ordinances of the city, have given the required notices and have held the required public hearings regarding this amendment to CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended; and

WHEREAS, on June 18, 1986, the city council passed Ordinance No. 19196, which amended the Dallas City Code, as amended, by adding Chapter 41A, "SEXUALLY ORIENTED BUSINESSES"; and

WHEREAS, on August 6, 1986, the city council adopted Resolution No. 86-2453, clarifying certain definitions in Ordinance No. 19196; and

WHEREAS, Section 3 of Resolution No. 86-2453 directed the city attorney to draft an ordinance amending Section 41A-13(a) of the city code in a manner consistent with the intent expressed in Resolution No. 86-2453; and

WHEREAS, the city attorney has drafted this ordinance in accordance with the directive of Resolution No. 86-2453; and

WHEREAS, the city attorney has further advised that enforcement of Ordinance No. 19196 can be enhanced by amending certain of its provisions dealing with issuance and revocation at licenses and inspection provisions relating to sexually oriented businesses; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That Subsection (13) of Section 41A-2, "Definitions," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended to read as follows:

"(13) NUDITY or a STATE OF NUDITY means:

(A) the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast, or

(B) *a state of dress which fails to opaquely cover a human buttock, anus, male genitals, female genitals, or areola of the female breast.*"

SECTION 2. That Subsections (15) through (21) of Section 41A-2, "Definitions," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, are hereby renumbered as Subsections (17) through (23) respectively.

SECTION 3. That Section 41A-2, "Definitions," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended by adding new Subsections (15) and (16) to read as follows:

"(15) RESIDENTIAL DISTRICT means a single family, duplex, townhouse, multiple family or mobile home zoning district as defined in the Dallas Development Code.

(16) RESIDENTIAL USE means a single family, duplex, multiple family, or "mobile home park, mobile home subdivision, and campground" use as defined in the Dallas Development Code."

SECTION 4. That Section 41A-5, "Issuance of License," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended is amended to read as follows:

"SEC. 41A-5. ISSUANCE OF LICENSE.

(a) The chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:

(1) An applicant is under 18 years of age.

(2) An applicant or an applicant's spouse is overdue in his payment to the city of taxes, fees, fines, or penalties assessed against him or imposed upon him in relation to a sexually oriented business.

(3) An applicant has failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form.

(4) An applicant or an applicant's spouse has been convicted of a violation of a provision of this chapter, other than the offense of operating a sexually oriented business without a license, within two years immediately preceding the application. The fact that a conviction is being appealed shall have no effect.

(5) An applicant is residing with a person who has been denied a license by the city to operate a sexually oriented business within the preceding 12 months, or residing with a person whose license to operate a sexually oriented business has been revoked within the preceding 12 months.

(6) The premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances.

(7) The license fee required by this chapter has not been paid.

(8) An applicant has been employed in a sexually oriented business in a managerial capacity within the preceding manage a sexually oriented business premises in a peaceful and law-abiding manner, *thus necessitating action by law enforcement officers.*

(9) An applicant or the proposed establishment is in violation of or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19 or 41A-20.

(10) An applicant or an applicant's spouse has been convicted of [~~or is under indictment or misdemeanor information for~~] a crime:

(A) involving:

(i) any of the following offenses as described in Chapter 43 of the Texas Penal Code:

(aa) prostitution;

(bb) promotion of prostitution;

(cc) aggravated promotion of prostitution;

- (dd) compelling prostitution;
- (ee) obscenity;
- (ff) sale, distribution, or display of harmful material to minor;
- (gg) sexual performance by a child;
- (hh) possession of child pornography;
- (ii) any of the following offenses as described in Chapter 21 of the Texas Penal Code:
 - (aa) public lewdness;
 - (bb) indecent exposure;
 - (cc) indecency with a child;
 - ~~[(iii) engaged in organized criminal activity as described in Chapter 71 of the Texas Penal Code;]~~
 - (iii) ~~[(iv)]~~ sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;
 - (iv) ~~[(v)]~~ incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code;
 - ~~[(vi) kidnapping or aggravated kidnapping as described in Chapter 20 of the Texas Penal Code;]~~
 - ~~[(vii) robbery or aggravated robbery as described in Chapter 29 of the Texas Penal Code;]~~
 - ~~[(viii) bribery or retaliation as described in Chapter 36 of the Texas Penal Code;]~~
 - ~~[(ix) a violation of the Texas Controlled Substances Act or Dangerous Drugs Act punishable as a felony, Class A misdemeanor, or Class B misdemeanor;]~~ or

(v) ~~(4A)~~ criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;

(B) for which:

(i) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;

(ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or

(iii) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemeanor offenses or combination of misdemeanor offenses occurring within any 24-month period.

(b) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or applicant's spouse.

(c) An applicant who has been convicted or whose spouse has been convicted of an offense listed in Subsection (a)(10) ~~(, for which the required time period has elapsed since the date of conviction or the date of release from confinement imposed for the conviction,)~~ may qualify for a sexually oriented business license only *when the time period required by Section 41A-5(a)(10)(B) has elapsed. (if the chief of police determines that the applicant or applicant's spouse is presently fit to operate a sexually oriented business. In determining present fitness under this section, the chief of police shall consider the following factors concerning the applicant or applicant's spouse, whichever had the criminal conviction;*

~~(1) the extent and nature of his past criminal activity;~~

~~(2) his age at the time of the commission of the crime;~~

~~(3) the amount of time that has elapsed since his last criminal activity;~~

~~(4) his conduct and work activity prior to and following the criminal activity;~~

~~(5) evidence of his rehabilitation or rehabilitative effort while incarcerated or following release; and~~

~~(6) other evidence of his present fitness, including letters of recommendation from prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for him; the sheriff and chief of police in the community where he resides; and any other persons in contact with him.~~

~~(d) It is the responsibility of the applicant, to the extent possible, to secure and provide to the chief of police the evidence required to determine present fitness under subsection (c) of this section.]~~

(d) ~~(e)~~ The license, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, and the address of the sexually oriented business. The license shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time."

SECTION 5. That Section 41A-7, "Inspection," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended by adding a new Subsection (c), to read as follows:

"(c) The provisions of this section do not apply to areas of an adult motel which are currently being rented by a customer for use as a permanent or temporary habitation."

SECTION 6. That Subsections (d) and (e) of Section 41A-10, "Revocation," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, are amended to read as follows:

"(d) Subsection (b)(7) does not apply to adult motels as a ground for revoking the license unless the licensee or employee knowingly allowed the act of sexual intercourse, sodomy, oral copulation, masturbation, or sexual contact to occur in a public place or within public view.

(e) When the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a sexually oriented business license for one year from the date revocation became effective. If, subsequent to revocation, the chief of police finds that the basis for the revocation has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date the revocation became effective. If the license was revoked under Subsection (b)(5), an applicant may not be granted another license until the appropriate number of years required under Section 41A-5(a)(10)(B) has elapsed [~~since the termination of any sentence, parole, or probation~~]."

SECTION 7. That Subsection (a) of Section 41A-13, "Location of Sexually Oriented Businesses," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended to read as follows:

"(a) A person commits an offense if he operates or causes to be operated a sexually oriented business within 1,000 feet of:

- (1) a church;
- (2) a public or private elementary or secondary school;
- (3) a boundary of a residential district as defined in *this chapter* [~~by the Dallas Development Code~~];
- (4) a public park adjacent to a residential district as defined in *this chapter* [~~by the Dallas Development Code~~];
or
- (5) the property line of a lot devoted to a residential use as defined in *this chapter*."

SECTION 8. That a person violating a provision of this ordinance, upon conviction, is punishable by a fine not to exceed \$1,000.

SECTION 9. That CHAPTER 41A of the Dallas City Code, as amended, shall remain in full force and effect, save and except as amended by this ordinance.

SECTION 10. That the terms and provisions of this ordinance are severable and are governed by Section 1-4 of CHAPTER 1 of the Dallas City Code, as amended.

SECTION 11. That this ordinance shall take effect immediately from and after its passage and publication in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so ordered.

October 12, 1986

In The
Supreme Court of the United States
October Term, 1988

No. 87-2012
FW/PBS, INC., et al.,

v.

Petitioners,

CITY OF DALLAS, et al.,

Respondents.

No. 87-2051
M.J.R., INC., et al.,

v.

Petitioners,

CITY OF DALLAS, et al.,

Respondents.

No. 88-49
CALVIN BERRY, III, et al.,

v.

Petitioners,

CITY OF DALLAS, et al.,

Respondents.

On Writs Of Certiorari To The United States
Court Of Appeals To The Fifth Circuit

JOINT APPENDIX

(All Counsel Listed on Inside Cover)

Petition for Certiorari in No. 87-2012 Filed June 8, 1988
Certiorari in No. 87-2012 on Issues I, II and III
Granted February 27, 1989
Petition for Certiorari in No. 87-2051 Filed June 13, 1988
Certiorari in No. 87-2051 on Issues I and II
Granted February 27, 1989
Petition for Certiorari in No. 88-49 Filed June 13, 1988
Certiorari in No. 88-49 Granted February 27, 1989

ARTHUR M. SCHWARTZ*
ARTHUR M. SCHWARTZ, P.C.
600 - 17th Street, Suite 2250S
Denver, Colorado 80202
(303) 893-2500
*Counsel for Petitioners
in Case No. 87-2012*

RICHARD L. WILSON
902 Lee Road, Suite 30-450
Orlando, Florida 32810-5585
(407) 648-9129

JOHN H. WESTON
G. RANDALL GARROU
433 North Camden Drive, Suite 900
Beverly Hills, California 90210
(213) 550-7460
*Counsel for Petitioners
in Case No. 87-2051*

*Counsel of Record

FRANK HERNANDEZ
5999 Summerside,
Suite 101
Dallas, Texas 75252
(214) 931-9444
*Counsel for Petitioners
in Case No. 88-49*

CARROL R. GRAHAM
MARK K. O'BRIANT
THOMAS BRANDT
Office of the City Attorney
7BN City Hall
1500 Marilla Street
Dallas, Texas 75201
(214) 670-3510
Counsel for Respondents

TABLE OF CONTENTS

Page

Relevant Docket Entries

United States District Court.....	1
United States Court of Appeals for the Fifth Circuit	3
United States Supreme Court	4

United States District Court

Order of Judgment and Memorandum Opinion (Dumas v. City Dallas) Printed as Appendix F to Petition for Certiorari, in Case No. 87-2012, pp. 39-70)	6
---	---

United States Court of Appeals for the Fifth Circuit

Opinion of United States Court of Appeals (FW/PBS, Inc. v. City of Dallas) (Printed as Appendix A to the Petition for Certiorari in Case No. 87-2012, pp. 39-70)	6
Denial of Petition for Rehearing and Suggestion for Rehearing En Banc (Printed as Appendix B to the Petition for Certiorari in Case No. 87-2012, pp. 31-32)	6
Denial of Petitioners' Motion for Stay of the Issuance of the Mandate (Printed as Appendix C to the Petition for Certiorari in Case No. 87-2012, pp. 33-36	6

United States Supreme Court

Order granting Petition for Certiorari in Case No. 87-2012 on Issues I, II, and III, granting Petition for Certiorari in Case No. 87-2051 on Issues I and II, and granting Petition for Certiorari on Case No. 88-49	7
--	---

TABLE OF CONTENTS—Continued

Page

Dallas Municipal Code Sections

Dallas Municipal Code Chapter 41A (as amended)	8
Dallas Municipal Code Sections 2-95 and 2-96	38
Dallas Development Code Section 51-1.101, Section 51-1.105	40
Dallas Development Code Section 51-3.102, Section 51-3.105	43
Dallas Development Code Section 51-7.705	48
Dallas Municipal Code Chapter 6A	50
Dallas Municipal Code Chapter 14	59
Dallas Municipal Code Chapter 46	70

FW/PBS, INC., et al. v. CITY OF DALLAS, et al.

RELEVANT DOCKET ENTRIES

*Date of
Filing*

UNITED STATES DISTRICT COURT

6/30/86

Plaintiffs', FW/PBS, Inc., et al., Complaint for Declaratory Relief, Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and Attorneys Fees

6/30/86

Plaintiffs', FW/PBS, Inc., et al., Motion for Temporary Restraining Order and/or Preliminary Injunction

7/9/86

Court's Order requiring parties to submit affidavits and/or depositions in determining Plaintiffs', FW/PBS, Inc., et al., request for preliminary injunction

7/15/86

Plaintiffs', M.J.R., Inc., et al., Original Complaint, Complaint for Declaratory Judgment, Complaint for Temporary Restraining Order, Complaint for Temporary Injunction, Complaint for Preliminary Injunction and Complaint for Permanent Injunction

7/15/86

Plaintiffs', M.J.R., Inc., et al., Motion for Temporary Restraining Order and Brief in support thereof

7/15/86

Plaintiffs', M.J.R., Inc., et al., Application for Preliminary Injunction

7/17/86

Plaintiffs', Calvin Berry, III, et al., Complaint for Declaratory Relief, Temporary Restraining Order, Preliminary Injunction and Permanent Injunction

7/18/86

Court's Order of Transfer, transferring Plaintiffs', FW/PBS, Inc., et al., case to

the docket of the Honorable Jerry Buckmeyer.

7/30/86	Defendants' Motion to Dismiss, Motion for Judgment on the Pleadings and Supporting Brief
7/31/86	Defendants' Original Answer
7/31/86	Defendants' Motion for Summary Judgment and Supporting Brief
8/4/86	Court's Order of Consolidation and Dismissal
8/6/86	Court's Order confirming accelerated schedule
8/8/86	Court's Order amending Order of August 6, 1986
8/13/86	Plaintiffs', FW/PBS, Inc., et al., Cross-Motion for Summary Judgment and Supporting Brief
8/15/86	Plaintiffs', M.J.R., Inc., et al., Brief in Support of Motion for Summary Judgment
8/15/86	Plaintiffs', Calvin Berry, III, et al., Motion for Summary Judgment and Supporting Brief
8/20/86	Court's Order setting oral argument for September 11, 1986
9/5/86	Defendants' Response to Plaintiffs' Motion for Summary Judgment and Supplement to its Motion for Summary Judgment and Brief in support
9/11/86	Oral argument on parties' Motions and Cross-Motions for Summary Judgment
9/12/86	Court's Order of Judgment denying Defendants' Motion to Dismiss, granting Defendants' Motion for Summary

Judgment in part, granting Plaintiffs' Motions in part, and enjoining the City from enforcing specific subsections of challenged ordinance, which when severed renders the ordinance constitutional, and Memorandum Opinion

10/7/86 Plaintiffs', FW/PBS, Inc., et al., Notice of Appeal

10/9/86 Plaintiffs', M.J.R., Inc., et al., and Calvin Berry, III, et al., Notices of Appeal

*UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

9/3/87 Oral Argument in the United States District Court of Appeals for the Fifth Circuit

2/12/88 Court's Opinion affirming trial court's decision

2/24/88 Appellants', FW/PBS, Inc., et al., Petition for Rehearing and Suggestion for Rehearing En Banc

2/26/88 Appellants', M.J.R., Inc., et al., Suggestion for Rehearing En Banc

3/14/88 Court's Opinion denying Appellants' petition for panel rehearing and suggestions for rehearing En Banc

3/17/88 Appellants', FW/PBS, Inc., et al., Motion to Stay Issuance of Mandate Pending Application for Writ of Certiorari to the United States Supreme Court

3/24/88 Appellee's Opposition to Motion to Stay Issuance of Mandate

- 4/5/88 Court's Order denying Appellants', FW/PBS, Inc., et al., Motion to Stay Issuance of Mandate
- UNITED STATES SUPREME COURT
- 4/14/88 Petitioners' FW/PBS, Inc., et al., Application for Recall and Stay of Mandate of United States Court of Appeals for the Fifth Circuit
- 4/20/88 United States Supreme Court Associate Justice Byron R. White's Order that judgment and mandate be temporarily stayed pending receipt of responses and further order of Court
- 4/22/88 Respondents' Response to Petitioners' Application for Recall and Stay of Mandate of Fifth Circuit Court of Appeals
- 4/22/88 Petitioners', M.J.R., Inc., et al., Response in Support of Application of FW/PBS, et al. for Recall and Stay of Mandate of United States Court of Appeals for the Fifth Circuit
- 4/22/88 Petitioners', Calvin Berry, III, et al., Response to Application for Recall and Stay of Mandate of the United States Court of Appeals for the Fifth Circuit
- 5/4/88 Court's Order vacating Justice Byron R. White's temporary stay, granting Petitioners' application for stay and staying judgment of the United States Court of Appeals for the Fifth Circuit in part, pending judgment of this Court
- 6/8/88 Petitioners' FW/PBS, Inc., et al., Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit
-

- 6/13/88 Petitioners', M.J.R., Inc., et al., Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit
- 6/13/88 Petitioners', Calvin Berry, III, et al., Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit
- 7/12/88 Respondents' Brief in Opposition to Petitioners' Petitions for Writ of Certiorari
- 8/10/88 Petitioners', FW/PBS, Inc., et al., Reply Brief in Support of Petition for Writ of Certiorari
- 2/27/89 Petitioners', FW/PBS, Inc., et al., Petition for Writ of Certiorari is granted as to Questions I, II and III of Petition; Petitioners', M.J.R., Inc., et al., Petition for Writ of Certiorari is granted as to Questions 1 and 2; and Petitioners', Calvin Berry, III, et al., Petition for Writ of Certiorari is granted.
-

UNITED STATES DISTRICT COURT

Case No. CA3-86-1759-R

Order of Judgment and Memorandum Opinion, *FW/PBS Inc., et al. v. City of Dallas, et al.* (Printed as Appendix F to the Petition for Certiorari in Case No. 87-2012, pp. 39-70)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 86-1723

Opinion, *FW/PBS, Inc. et al. v. City of Dallas, et al.*, (Printed as Appendix A to the Petition for Certiorari in Case No. 87-2012, pp. 1-30)

Denial of Petition for Rehearing and Suggestion for Rehearing En Banc (Printed as Appendix B to the Petition for Certiorari in Case No. 87-2012, pp. 31-32)

Denial of Petitioner's Motion for Stay of the Issuance of the Mandate pending filing of Petition for Writ of Certiorari (Printed as Appendix C to the Petition for Certiorari in Case No. 87-2012, pp. 33-36)

SUPREME COURT OF THE UNITED STATES

FW/PBS, Inc., dba Paris Adult Bookstore II, et al.,
v. City of Dallas, et al.

No. 87-2012

M.J.R., Inc., et al.,
v. City of Dallas

No. 87-2051

Calvin Berry, III, et al.,
v. City of Dallas, et al.

No. 88-49

February 27, 1989

The motion of Citizens For Decency Through Law, Inc. for leave to file a brief as amicus curiae in No. 87-2012 is granted. The petition for a writ of certiorari in No. 87-2012 is granted limited to Questions I, II and III presented by the petition. The petition for a writ of certiorari in No. 87-2051 is granted limited to Questions 1 and 2 presented by the petition. The petition for a writ of certiorari in No. 88-49 is granted. The cases are consolidated and a total of one hour is allotted for oral argument.

SEXUALLY ORIENTED BUSINESSES

CHAPTER 41A. SEXUALLY ORIENTED BUSINESSES

SEC. 41A-1.	Purpose and intent.
SEC. 41A-2.	Definitions.
SEC. 41A-3.	Classifications.
SEC. 41A-4.	License required.
SEC. 41A-5.	Issuance of license.
SEC. 41A-6.	Fees.
SEC. 41A-7.	Inspection.
SEC. 41A-8.	Expiration of license.
SEC. 41A-9.	Suspension.
SEC. 41A-10.	Revocation.
SEC. 41A-11.	Appeal.
SEC. 41A-12.	Transfer of license.
SEC. 41A-13.	Location of sexually oriented businesses.
SEC. 41A-14.	Exemption from location restrictions.
SEC. 41A-15.	Additional regulations for escort agencies.
SEC. 41A-16.	Additional regulations for nude model studios.
SEC. 41A-17.	Additional regulations for adult theaters and adult motion picture theaters.
SEC. 41A-18.	Additional regulations for adult motels.
SEC. 41A-19.	Regulations pertaining to exhibition of sexually explicit films or videos.
SEC. 41A-20.	Display of sexually explicit material to minors.
SEC. 41A-21.	Enforcement.
SEC. 41A-22.	Injunction.
SEC. 41A-23.	Amendment of this chapter.

CHAPTER 41A. SEXUALLY ORIENTED BUSINESSES

CHAPTER 41A-1. PURPOSE AND INTENT.

(a) It is the purpose of this chapter to regulate sexually oriented businesses to promote the health,

safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market.

(b) It is the intent of the city council that the locational regulations of Section 41A-13 of this chapter are promulgated pursuant to Article 2372w, Revised Civil Statutes of Texas, as they apply to nude model studios and sexual encounter centers only. It is the intent of the city council that all other provisions of this chapter are promulgated pursuant to the Dallas City Charter and Article 1175, Revised Civil Statutes of Texas. (Ord. 19196)

SEC. 41A-2. DEFINITIONS.

In this chapter:

(1) ADULT ARCADE means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing

of "specified sexual activities" or "specified anatomical areas."

(2) ADULT BOOKSTORE or ADULT VIDEO STORE means a commercial establishment which as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following:

(A) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which depict or describe "specified sexual activities" or "specified anatomical areas"; or

(B) instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities."

(3) ADULT CABARET means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:

(A) persons who appear in a state of nudity; or

(B) live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or

(C) films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description or "specified sexual activities" or "specified anatomical areas."

(4) ADULT MOTEL means a hotel, motel or similar commercial establishment which:

(A) offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; and has a sign visible from the public right of way which advertises the availability of this adult type of photographic reproductions; or

(B) offers a sleeping room for rent for a period of time that is less than 10 hours; or

(C) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than 10 hours.

(5) ADULT MOTION PICTURE THEATER means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

(6) ADULT THEATER means a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities."

(7) CHIEF OF POLICE means the chief of police of the city of Dallas or his designated agent.

(8) ESCORT means a person who, for consideration, agrees or offers to act as a companion, guide, or date of another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.

(9) ESCORT AGENCY means a person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes, for a fee, tip, or other consideration.

(10) ESTABLISHMENT means and includes any of the following:

(A) the opening or commencement of any sexually oriented business as a new business;

(B) the conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;

(C) the addition of any sexually oriented business to any other existing sexually oriented business; or

(D) the relocation of any sexually oriented business.

(11) LICENSEE means a person in whose name a license to operate a sexually oriented business has been issued, as well as the individual listed as an applicant on the application for a license.

(12) NUDE MODEL STUDIO means any place where a person who appears in a state of nudity or displays "specified anatomical areas" is provided to be

observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration.

(13) NUDITY or a STATE OF NUDITY means:

(A) the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast; or

(B) a state of dress which fails to opaquely cover a human buttock, anus, male genitals, female genitals, or areola of the female breast.

(14) PERSON means an individual, proprietorship, partnership, corporation, association, or other legal entity.

(15) RESIDENTIAL DISTRICT means a single family, duplex, townhouse, multiple family or mobile home zoning district as defined in the Dallas Development Code.

(16) RESIDENTIAL USE means a single family, duplex, multiple family, or "mobile home park, mobile home subdivision, and campground" use as defined in the Dallas Development Code.

(17) SEMI-NUDE means a state of dress in which clothing covers no more than the genitals, pubic region, and areolae of the female breast, as well as portions of the body covered by supporting straps or devices.

(18) SEXUAL ENCOUNTER CENTER means a business or commercial enterprise that, as one of its primary business purposes, offers for any form of consideration:

(A) physical contact in the form of wrestling or tumbling between persons of the opposite sex; or

(B) activities between male and female persons and/or persons of the same sex when one or more of the persons is in a state of nudity or semi-nude.

(19) SEXUALLY ORIENTED BUSINESS means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center.

(20) SPECIFIED ANATOMICAL AREAS means human genitals in a state of sexual arousal.

(21) SPECIFIED SEXUAL ACTIVITIES means and includes any of the following:

(A) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;

(B) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;

(C) masturbation, actual or simulated; or

(D) excretory functions as part of or in connection with any of the activities set forth in (A) through (C) above.

(22) SUBSTANTIAL ENLARGEMENT of a sexually oriented business means the increase in floor area occupied by the business by more than 25 percent, as the floor area exists on June 18, 1986.

(23) TRANSFER OF OWNERSHIP OR CONTROL of a sexually oriented business means and includes any of the following:

(A) the sale, lease, or sublease of the business;

(B) the transfer of securities which constitute a controlling interest in the business, whether by sale, exchange, or similar means; or

(C) the establishment of a trust, gift, or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control. (Ord. Nos. 19196; 19377)

SEC. 41A-3. CLASSIFICATION.

Sexually oriented businesses are classified as follows:

- (1) adult arcades;
- (2) adult bookstores or adult video stores;
- (3) adult cabarets;
- (4) adult motels;
- (5) adult motion picture theaters;
- (6) adult theaters;
- (7) escort agencies;
- (8) nude model studios; and
- (9) sexual encounter centers. (Ord. 19196)

SEC. 41A-4. LICENSE REQUIRED.

(a) A person commits an offense if he operates a sexually oriented business without a valid license, issued by the city for the particular type of business.

(b) An application for a license must be made on a form provided by the chief of police. The application must be accompanied by a sketch or diagram showing the configuration of the premises, including a statement of total floor space occupied by the business. The sketch or diagram need not be professionally prepared but must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six inches. Applicants who must comply with Section 41A-19 of this chapter shall submit a diagram meeting the requirements of Section 41A-19.

(c) The applicant must be qualified according to the provisions of this chapter and the premises must be inspected and found to be in compliance with the law by the health department, fire department, and building official.

(d) If a person who wishes to operate a sexually oriented business is an individual, he must sign the application for a license as applicant. If a person who wishes to operate a sexually oriented business is other than an individual, each individual who has a 20 percent or greater interest in the business must sign the application for a license as applicant. Each applicant must be qualified under Section 41A-5 and each applicant shall be considered a licensee if a license is granted.

(e) The fact that a person possesses a valid theater license, dance hall license, or public house of amusement license does not exempt him from the requirement of obtaining a sexually oriented business license. A person who operates a sexually oriented business and possesses a theater license, public house of amusement license or dance hall license shall comply with the requirements and provisions of this chapter as well as the requirements and provisions of Chapter 46 and Chapter 14 of this code when applicable. (Ord. 19196)

SEC. 41A-5. ISSUANCE OF LICENSE.

(a) The chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:

(1) An applicant is under 18 years of age.

(2) An applicant or an applicant's spouse is overdue in his payment to the city of taxes, fees, fines, or penalties assessed against him or imposed upon him in relation to a sexually oriented business.

(3) An applicant has failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form.

(4) An applicant or an applicant's spouse has been convicted of a violation of a provision of this chapter, other than the offense of operating a sexually oriented business without a license, within two years

immediately preceding the application. The fact that a conviction is being appealed shall have no effect.

(5) An applicant is residing with a person who has been denied a license by the city to operate a sexually oriented business within the preceding 12 months, or residing with a person whose license to operate a sexually oriented business has been revoked within the preceding 12 months.

(6) The premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances.

(7) The license fee required by this chapter has not been paid.

(8) An applicant has been employed in a sexually oriented business in a managerial capacity within the preceding 12 months and has demonstrated that he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner, thus necessitating action by law enforcement officers.

(9) An applicant or the proposed establishment is in violation of or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19 or 41A-20.

(10) An applicant or an applicant's spouse has been convicted of a crime:

(A) involving:

(i) any of the following offenses as described in Chapter 43 of the Texas Penal Code:

- (aa) prostitution;
- (bb) promotion of prostitution;
- (cc) aggravated promotion of prostitution;
- (dd) compelling prostitution;
- (ee) obscenity;
- (ff) sale, distribution, or display of harmful material to minor;
- (gg) sexual performance by a child;
- (hh) possession of child pornography;
- (ii) any of the following offenses as described in Chapter 21 of the Texas Penal Code:
 - (aa) public lewdness;
 - (bb) indecent exposure;
 - (cc) indecency with a child;
 - (iii) sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;
 - (iv) incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code; or
 - (v) criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;
- (B) for which:
 - (i) less than two years have elapsed since the date of conviction or the date of release from confinement

imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;

(ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or

(iii) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemeanor offenses or combination of misdemeanor offenses occurring within any 24-month period.

(b) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or applicant's spouse.

(c) An applicant who has been convicted or whose spouse has been convicted of an offense listed in Subsection (a)(10) may qualify for a sexually oriented business license only when the time period required by Section 41A-5(a)(10)(B) has elapsed.

(d) The license, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, and the address of the sexually oriented business. The license shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time. (Ord. Nos. 19196; 19377)

SEC. 41A-6. FEES.

(a) The annual fee for a sexually oriented business license is \$500.

(b) If an applicant is required by this code to also obtain a dance hall license or public house of amusement license for the business at a single location, payment of the fee for the sexually oriented business license exempts the applicant from payment of the fees for the dance hall or public house of amusement licenses. (Ord. 19196)

SEC. 41A-7. INSPECTION.

(a) An applicant or licensee shall permit representatives of the police department, health department, fire department, housing and neighborhood services department, and building inspection division to inspect the premises of a sexually oriented business for the purpose of insuring compliance with the law, at any time it is occupied or open for business.

(b) A person who operates a sexually oriented business or his agent or employee commits an offense if he refuses to permit a lawful inspection of the premises by a representative of the police department at any time it is occupied or open for business.

(c) The provisions of this section do not apply to areas of an adult motel which are currently being rented by a customer for use as a permanent or temporary habitation. (Ord. Nos. 19196; 19377)

SEC. 41A-8. EXPIRATION OF LICENSE.

(a) Each license shall expire one year from the date of issuance and may be renewed only by making application as provided in Section 41A-4. Application for renewal should be made at least 30 days before the expiration date, and when made less than 30 days before the expiration date, the expiration of the license will not be affected.

(b) When the chief of police denies renewal of a license, the applicant shall not be issued a license for one year from the date of denial. If, subsequent to denial, the chief of police finds that the basis for denial of the renewal license has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date denial became final. (Ord. 19196)

SEC. 41A-9. SUSPENSION.

The chief of police shall suspend a license for a period not to exceed 30 days if he determines that a licensee or an employee of a licensee has:

(1) violated or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19, or 41A-20 of this chapter;

(2) engaged in excessive use of alcoholic beverages while on the sexually oriented business premises;

(3) refused to allow an inspection of the sexually oriented business premises as authorized by this chapter;

(4) knowingly permitted gambling by any person on the sexually oriented business premises;

(5) demonstrated inability to operate or manage a sexually oriented business in a peaceful and law-abiding manner thus necessitating action by law enforcement officers. (Ord. 19196)

S.C. 41A-10. REVOCATION.

(a) The chief of police shall revoke a license if a cause of suspension in Section 41A-9 occurs and the license has been suspended within the preceding 12 months.

(b) The chief of police shall revoke a license if he determines that:

(1) a licensee gave false or misleading information in the material submitted to the chief of police during the application process;

(2) a licensee or an employee has knowingly allowed possession, use, or sale of controlled substances on the premises;

(3) a licensee or an employee has knowingly allowed prostitution on the premises;

(4) a licensee or an employee knowingly operated the sexually oriented business during a period of time when the licensee's license was suspended;

(5) a licensee has been convicted of an offense listed in Section 41A-5(a)(10)(A) for which the time period required in Section 41A-5(a)(10)(B) has not elapsed;

(6) on two or more occasions within a 12-month period, a person or persons committed an offense occurring in or on the licensed premises of a crime listed in Section 41A-5(a)(10)(A), for which a conviction has been obtained, and the person or persons were employees of the sexually oriented business at the time the offenses were committed;

(7) a licensee or an employee has knowingly allowed any act of sexual intercourse, sodomy, oral copulation, masturbation or sexual contact to occur in or on the licensed premises. The term "sexual contact" shall have the same meaning as it is defined in Section 21.01, Texas Penal Code; or

(8) a licensee is delinquent in payment to the city for hotel occupancy taxes, ad valorem taxes, or sales taxes related to the sexually oriented business.

(c) The fact that a conviction is being appealed shall have no effect on the revocation of the license.

(d) Subsection (b)(7) does not apply to adult motels as a ground for revoking the license unless the licensee or employee knowingly allowed the act of sexual intercourse, sodomy, oral copulation, masturbation, or sexual contact to occur in a public place or within public view.

(e) When the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a sexually oriented business license for one year from the date revocation became effective. If, subsequent to revocation, the chief of police finds that the basis for the revocation has been corrected or abated, the applicant may be granted a license if at least 90 days have

elapsed since the date the revocation became effective. If the license was revoked under Subsection (b)(5), an applicant may not be granted another license until the appropriate number of years required under Section 41A-5(a)(10)(B) has elapsed. (Ord. Nos. 19196; 19377)

SEC. 41A-11. APPEAL.

If the chief of police denies the issuance of a license, or suspends or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action and the right to an appeal. The aggrieved party may appeal the decision of the chief of police to a permit and license appeal board in accordance with Section 2-96 of this code. The filing of an appeal stays the action of the chief of police in suspending or revoking a license until the permit and license appeal board makes a final decision. If within a 10 day period the chief of police suspends, revokes, or denies issuance of a dance hall license or public house of amusement license for the same location involved in the chief's actions on the sexually oriented business license, then the chief may consolidate the requests for appeals of those actions into one appeal. (Ord. 19196)

SEC. 41A-12. TRANSFER OF LICENSE.

A licensee shall not transfer this license to another, nor shall a licensee operate a sexually oriented business under the authority of a license at any place other than the address designated in the application. (Ord. 19196)

SEC. 41A-13. LOCATION OF SEXUALLY ORIENTED BUSINESSES.

(a) A person commits an offense if he operates or causes to be operated a sexually oriented business within 1,000 feet of:

- (1) a church;
- (2) a public or private elementary or secondary school;
- (3) a boundary of a residential district as defined in this chapter;
- (4) a public park adjacent to a residential district as defined in this chapter; or
- (5) the property line of a lot devoted to a residential use as defined in this chapter.

(b) A person commits an offense if he causes or permits the operation, establishment, substantial enlargement, or transfer of ownership or control of a sexually oriented business within 1,000 feet of another sexually oriented business.

(c) A person commits an offense if he causes or permits the operation, establishment, or maintenance of more than one sexually oriented business in the same building, structure, or portion thereof, or the increase of floor area of any sexually oriented business in any building, structure, or portion thereof containing another sexually oriented business.

(d) For the purposes of Subsection (a), measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion

of the building or structure used as a part of the premises where a sexually oriented business is conducted, to the nearest property line of the premises of a church or public or private elementary or secondary school, or to the nearest boundary of an affected public park, residential district, or residential lot.

(e) For purposes of Subsection (b) of this section, the distance between any two sexually oriented businesses shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which each business is located.

(f) Any sexually oriented business lawfully operating on June 18, 1986, that is in violation of Subsections (a), (b), or (c) of this section shall be deemed a nonconforming use. The nonconforming use will be permitted to continue for a period not to exceed three years, unless sooner terminated for any reason or voluntarily discontinued for a period of 30 days or more. Such nonconforming uses shall not be increased, enlarged, extended or altered except that the use may be changed to a conforming use. If two or more sexually oriented businesses are within 1,000 feet of one another and otherwise in a permissible location, the sexually oriented business which was first established and continually operating at a particular location is the conforming use and the later-established business(es) is nonconforming.

(g) A sexually oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the location, subsequent to the grant or renewal of the sexually oriented business license, of a church, public or

private elementary or secondary school, public park, residential district, or residential lot within 1,000 feet of the sexually oriented business. This provision applies only to the renewal of a valid license, and does not apply when an application for a license is submitted after a license has expired or has been revoked. (Ord. Nos. 19196; 19377)

SEC. 41A-14. EXEMPTION FROM LOCATION RESTRICTIONS.

(a) If the chief of police denies the issuance of a license to an applicant because the location of the sexually oriented business establishment is in violation of Section 41A-13 of this chapter, then the applicant may, not later than 10 calendar days after receiving notice of the denial, file with the city secretary a written request for an exemption from the locational restrictions of Section 41A-13.

(b) If the written request is filed with the city secretary within the 10-day limit, a permit and license appeal board, selected in accordance with Section 2-95 of this code, shall consider the request. The city secretary shall set a date for the hearing within 60 days from the date the written request is received.

(c) A hearing by the board may proceed if at least two of the board members are present. The board shall hear and consider evidence offered by any interested person. The formal rules of evidence do not apply.

(d) The permit and license appeal board may, in its discretion, grant an exemption from the locational restrictions of Section 41A-13 if it makes the following findings:

(1) that the location of the proposed sexually oriented business will not have a detrimental effect on nearby properties or be contrary to the public safety or welfare;

(2) that the granting of the exemption will not violate the spirit and intent of this chapter of the city code;

(3) that the location of the proposed sexually oriented business will not downgrade the property values or quality of life in the adjacent areas or encourage the development of urban blight;

(4) that the location of an additional sexually oriented business in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any efforts of urban renewal or restoration; and

(5) that all other applicable provisions of this chapter will be observed.

(e) The board shall grant or deny the exemption by a majority vote. Failure to reach a majority vote shall result in denial of the exemption. Disputes of fact shall be decided on the basis of a preponderance of the evidence. The decision of the permit and license appeal board is final.

(f) If the board grants the exemption, the exemption is valid for one year from the date of the board's action. Upon the expiration of an exemption, the sexually oriented business is in violation of the locational restrictions of Section 41A-13 until the applicant applies for and receives another exemption.

(g) If the board denies the exemption, the applicant may not re-apply for an exemption until at least 12 months have elapsed since the date of the board's action.

(h) The grant of an exemption does not exempt the applicant from any other provisions of this chapter other than the locational restrictions of Section 41A-13. (Ord. 19196)

SEC. 41A-15. ADDITIONAL REGULATIONS FOR ESCORT AGENCIES.

(a) An escort agency shall not employ any person under the age of 18 years.

(b) A person commits an offense if he acts as an escort or agrees to act as an escort for any person under the age of 18 years. (Ord. 19196)

SEC. 41A-16. ADDITIONAL REGULATIONS FOR NUDE MODEL STUDIOS.

(a) A nude model studio shall not employ any person under the age of 18 years.

(b) A person under the age of 18 years commits an offense if he appears in a state of nudity in or on the premises of a nude model studio. It is a defense to prosecution under this subsection if the person under 18 years was in a restroom not open to public view or persons of the opposite sex.

(c) A person commits an offense if he appears in a state of nudity or knowingly allows another to appear in a state of nudity in an area of a nude model studio

premises which can be viewed from the public right of way.

(d) A nude model studio shall not place or permit a bed, sofa, or mattress in any room on the premises, except that a sofa may be placed in a reception room open to the public. (Ord. 19196)

SEC. 41A-17. ADDITIONAL REGULATIONS FOR ADULT THEATERS AND ADULT MOTION PICTURE THEATERS.

(a) The requirements and provisions of Chapter 46 of this code remain applicable to adult theaters and adult motion picture theaters.

(b) A person commits an offense if he knowingly allows a person under the age of 18 years to appear in a state of nudity in or on the premises of an adult theater or adult motion picture theater.

(c) A person under the age of 18 years commits an offense if he knowingly appears in a state of nudity in or on the premises of an adult theater or adult motion picture theater.

(d) It is a defense to prosecution under Subsections (b) and (c) of this section if the person under 18 years was in a restroom not open to public view or persons of the opposite sex. (Ord. 19196)

SEC. 41A-18. ADDITIONAL REGULATIONS FOR ADULT MOTELS.

(a) Evidence that a sleeping room in a hotel, motel, or similar commercial establishment has been rented and

vacated two or more times in a period of time that is less than 10 hours creates a rebuttable presumption that the establishment is an adult motel as that term is defined in this chapter.

(b) A person commits an offense if, as the person in control of a sleeping room in a hotel, motel, or similar commercial establishment that does not have a sexually oriented business license, he rents or subrents a sleeping room to a person and, within 10 hours from the time the room is rented, he rents or subrents the same sleeping room again.

(c) For purposes of Subsection (b) of this section, the terms "rent" or "subrent" mean the act of permitting a room to be occupied for any form of consideration. (Ord. 19196)

SEC. 41A-19. REGULATIONS PERTAINING TO EXHIBITION OF SEXUALLY EXPLICIT FILMS OR VIDEOS.

(a) A person who operates or causes to be operated a sexually oriented business, other than an adult motel, which exhibits on the premises in a viewing room of less than 150 square feet of floor space, a film, video cassette, or other video reproduction which depicts specified sexual activities or specified anatomical areas, shall comply with the following requirements:

(1) Upon application for a sexually oriented business license, the application shall be accompanied by a diagram of the premises showing a plan thereof specifying the location of one or more manager's stations and

the location of all overhead lighting fixtures and designating any portion of the premises in which patrons will not be permitted. A manager's station may not exceed 32 square feet of floor area. The diagram shall also designate the place at which the permit will be conspicuously posted, if granted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however each diagram should be oriented to the north or to some designated street or object and should be drawn to a designated scale or with marked dimensions sufficient to show the various internal dimensions of all areas of the interior of the premises to an accuracy of plus or minus six inches. The chief of police may waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the configuration of the premises has not been altered since it was prepared.

(2) The application shall be sworn to be true and correct by the applicant.

(3) No alteration in the configuration or location of a managers's station may be made without the prior approval of the chief of police or his designee.

(4) It is the duty of the owners and operator of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.

(5) The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manger's station of every area of the premises to which any patron is permitted access for any purpose

excluding restrooms. Restrooms may not contain video reproduction equipment. If the premises has two or more manager's stations designated, then the interior of the premises shall be configured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose from at least one of the manager's stations. The view required in this subsection must be by direct line of sight from the manager's station.

(6) It shall be the duty of the owners and operator, and it shall also be the duty of any agents and employees present in the premises to ensure that the view area specified in Subsection (5) remains unobstructed by any doors, walls, merchandise, display racks or other materials at all times that any patron is present in the premises and to ensure that no patron is permitted access to any area of the premises which has been designated as an area in which patrons will not be permitted in the application filed pursuant to Subsection (1) of this section.

(7) The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than one (1.0) footcandle as measured at the floor level.

(8) It shall be the duty of the owners and operator and it shall also be the duty of any agents and employees present in the premises to ensure that the illumination described above, is maintained at all times that any patron is present in the premises.

(b) A person having a duty under Subsections (1) through (8) of subsection (a) above commits an offense if he knowingly fails to fulfill that duty. (Ord. 19196)

SEC. 41A-20. DISPLAY OF SEXUALLY EXPLICIT MATERIAL TO MINORS.

(a) A person commits an offense if, in a business establishment open to persons under the age of 17 years, he displays a book, pamphlet, newspaper, magazine, film, or video cassette, the cover of which depicts, in a manner calculated to arouse sexual lust or passion for commercial gain or to exploit sexual lust or perversion for commercial gain, any of the following:

(1) human sexual intercourse, masturbation, or sodomy;

(2) fondling or other erotic touching of human genitals, pubic region, buttocks, or female breasts;

(3) less than completely and opaquely covered human genitals, buttocks, or that portion of the female breast below the top of the areola; or

(4) human male genitals in a discernibly turgid state, whether covered or uncovered.

(b) In this section "display" means to locate an item in such a manner that, without obtaining assistance from an employee of the business establishment:

(1) it is available to the general public for handling and inspection; or

(2) the cover or outside packaging on the item is visible to members of the general public. (Ord. 19196)

SEC. 41A-21. ENFORCEMENT.

(a) Except as provided by Subsection (b), any person violating Section 41A-13 of this chapter, upon conviction, is punishable by a fine not to exceed \$2,000.

(b) If the sexually oriented business involved is a nude model studio or sexual encounter center, then violation of Section 41A-4(a) or 41A-13 of this chapter is punishable as a Class B misdemeanor.

(c) Except as provided by Subsection (b), any person violating a provision of this chapter other than Section 41A-13, upon conviction, is punishable by a fine not to exceed \$500.

(d) It is a defense to prosecution under Section 41A-4(a), 41A-13, or 41A-16(d) that a person appearing in a state of nudity did so in a modeling class operated:

(1) by a proprietary school licensed by the state of Texas; a college, junior college, or university supported entirely or partly by taxation;

(2) by a private college or university which maintains and operates educational programs in which credits are transferrable to a college, junior college, or university supported entirely or partly by taxation; or

(3) in a structure:

(A) which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing; and

(B) where in order to participate in a class a student must enroll at least three days in advance of the class; and

(C) where no more than one nude model is on the premises at any one time.

(e) It is a defense to prosecution under Section 41A-4(a) or Section 41A-13 that each item of descriptive, printed, film, or video material offered for sale or rental, taken as a whole, contains serious literary, artistic, political, or scientific value. (Ord. Nos. 19196; 19963)

SEC. 41A-22. INJUNCTION.

A person who operates or causes to be operated a sexually oriented business without a valid license or in violation of Section 41A-13 of this chapter is subject to a suit for injunction as well as prosecution for criminal violations. (Ord. 19196)

SEC. 41A-23. AMENDMENT OF THIS CHAPTER.

Sections 41A-13 and 41A-14 of this chapter may be amended only after compliance with the procedure required to amend a zoning ordinance. Other sections of this chapter may be amended by vote of the city council. (Ord. 19196)

ARTICLE IX. PERMIT AND LICENSE APPEAL BOARD**SEC. 2-95. PERMIT AND LICENSE APPEAL BOARD -
CREATED; FUNCTION; TERMS; HEARING
PANELS.**

(a) There is hereby created the permit and license appeal board of the city, which shall be composed of 12 members appointed by the city council.

(b) The permit and license appeal board shall hear appeals filed in accordance with Section 2-96 of this chapter.

(c) All members shall be appointed for a term to expire on September 1, 1985. Subsequent appointments shall be made in August of odd-numbered years for a two year term beginning on September 1. All members shall serve until their successors are appointed and qualified.

(d) The city secretary shall divide the board into four hearing panels for the purpose of performing the duties of the board. The city secretary shall assign cases to the hearing panels on a rotating basis. Each hearing panel has the same authority as the full board. A decision by a hearing panel constitutes a decision by the board. (Ord. 18200)

**SEC. 2-96. APPEALS FROM ACTIONS OF DEPART-
MENT DIRECTORS.**

(a) If the director of a city department denies, suspends, or revokes a license or permit over which he has regulatory authority, and no appeal is provided by ordinance to another city board, the action is final unless the applicant, licensee, or permittee files a written appeal to

the permit and license appeal board with the city secretary within 10 calendar days after the date of receiving notice of the director's action.

(b) If a written request for an appeal hearing is filed with the city secretary within the 10 day limit, a permit and license appeal board, selected in accordance with Section 2-95 of this chapter, shall hear the appeal. The city secretary shall set a date for the hearing within 60 days from the date of the appeal. The permit and license appeal board shall hear and consider evidence offered by any interested person. The formal rules of evidence do not apply.

(c) The permit and license appeal board shall decide the appeal on the basis of a preponderance of the evidence presented at the hearing if there is a dispute of fact, otherwise the board shall decide the appeal in accordance with the provisions of this code. The board shall affirm, reverse, or modify the action of the director by a majority vote. Failure to reach a majority decision on a motion shall leave the director's decision unchanged. A hearing of a permit and license appeal board may proceed if at least two of the board members are present. The decision of the permit and license appeal board is final. (Ord. 18200)

Sec. 2-97.-2-100. RESERVED

DALLAS DEVELOPMENT CODE

ARTICLE I

TITLE, PURPOSE, ENFORCEMENT, CERTIFICATE OF
OCCUPANCY, FEES, NOTIFICATION SIGNS

SEC. 51-1.101. TITLE.

This chapter is known as the Dallas Development Code.

SEC. 51-1.102. PURPOSE.

The regulations in this chapter have been established in accordance with a comprehensive plan for the purpose of promoting the health, safety, morals, and general welfare of the city in order to:

- (1) lessen the congestion in the streets;
- (2) secure safety from fire, flooding, and other dangers;
- (3) provide adequate light and air;
- (4) prevent the overcrowding of land;
- (5) avoid undue concentration of population;
- (6) facilitate the adequate provision of transportation, water, sewage, schools, parks, and other public requirements;
- (7) promote the character of areas of the city;
- (8) limit the uses in areas of the city that are peculiarly suitable for particular uses;
- (9) conserve the value of buildings; and
- (10) encourage the most appropriate use of land throughout the city.

SEC. 51-1.103. ENFORCEMENT.

(a) *Criminal prosecution.*

(1) A person who violates any provision of this chapter is guilty of a separate offense for each day or portion of a day during which the violation is continued. Each offense is punishable by a fine not to exceed \$1,000.

(2) A person is criminally responsible for a violation of this chapter if:

(A) the person commits the violation or assists in the commission of the violation; or

(B) the person owns part or all of the land or a structure on the land where the violation exists.

(3) A person may not use land or a structure on land located in the city for other than those uses designated as permitted uses in accordance with the provisions of this chapter.

(4) It is a defense to prosecution under this chapter that a person is in compliance with an order of the board of adjustment that specifically authorizes otherwise unlawful conduct.

(b) *Civil action.* This chapter may be enforced through civil court action as provided by state law.

(c) *Utility disconnection.* The building official may order city or private utilities to be disconnected upon failure to comply with this chapter or the building laws.

(d) *Enforcement authority.* This chapter may be enforced by the building official or any other representative of the city. (Ord. 18001)

SEC. 51-1.104. CERTIFICATE OF OCCUPANCY.

(a) *Certificate of occupancy required.*

(1) Except for the single-family and duplex uses, a person shall not use or change the use of a building, a portion of a building, or land without obtaining a certificate of occupancy from the building official.

(2) A person shall submit an application for a certificate of occupancy on a form approved by the building official either:

(A) at the time of application for a building permit if there is new construction; or

(B) before occupancy and connection of utilities if there is a change of use.

(3) The building official shall not issue a certificate of occupancy until all applicable codes and ordinances have been complied with.

(b) *Record of certificates of occupancy.*

(1) The building official shall maintain a record of all certificates of occupancy.

(2) Upon request and payment of the fee, a person may obtain copies of the certificate of occupancy issued for a building or land.

SEC. 51-1.105. FEES.

(a) *Fees for zoning amendments.*

(1) An application will not be processed until the fee has been paid.

(2) The applicant shall pay the filing fee to the director. The director shall deliver fees received to the controller on the next business day following receipt of the fees.

(3) The refund of all or part of an application fee is controlled by Section 51-4.701(f).

* * *

SEC. 51-3.102. BOARD OF ADJUSTMENT.

(a) *Creation; Membership; Appointment.* There is hereby created the board of adjustment which shall consist of five members who are residents of the city. Members are appointed by the city council for two-year terms ending on September 1 of odd-numbered years and shall serve until their successors are appointed and qualified. A vacancy for the unexpired term of any member will be filled in the same manner as the original appointment was made. The city council may appoint four alternate members to the board who serve in the absence of one or more regular members when requested to do so by the chairman or by the city manager. The alternate members serve for the same period and are subject to removal the same as regular members. The city council shall fill vacancies occurring in the alternate membership the same as in the regular membership.

(b) *Quorum and Voting.* Cases must be heard by a minimum number of five members of the board. The concurring vote of four members is necessary to decide any matter. Each member who is present and entitled to vote shall vote in accordance with Chapter 8 of this Code.

(c) *Powers and Duties.* The board has the following powers and duties which must be exercised in accordance with this chapter:

(1) to hear and decide appeals from decisions of the building official made in the enforcement of this chapter;

(2) to interpret the intent of the zoning district map when uncertainty exists because the actual physical features differ from those indicated on the zoning district map and when the rules set forth in the zoning district boundary regulations do not apply;

(3) to hear and decide special exceptions that are expressly provided for in this chapter;

(4) to bring about the discontinuance of a nonconforming use under a plan whereby the full value of the structure can be amortized within a definite time period;

(5) to hear and decide requests for change of occupancy of a nonconforming use to another nonconforming use;

(6) to hear and decide requests for the enlargement of a nonconforming use;

(7) to hear and decide requests for reconstruction of a nonconforming structure on the land occupied by the structure when the reconstruction will not permanently

prevent the return of the property to a conforming use and will not increase the nonconformity;

(8) to require the vacation and demolition of a nonconforming structure that is determined to be obsolete, dangerous, dilapidated, or substandard;

(9) to consider on its own motion or upon the request of interested property owners, the operation or alteration of any use which is a nonconforming use because of its noncompliance with the environmental performance standards set forth in this chapter, and to specify the conditions and standards which must be complied with for continuance of the nonconforming use;

(10) to grant variances from the front yard, side yard, rear yard, lot width, lot depth, coverage, floor area ratios, height, minimum sidewalks, off-street parking or off-street loading, or visibility obstruction regulations that will not be contrary to the public interest when, owing to special conditions, a literal enforcement of this chapter would result in unnecessary hardship, and so that the spirit of the ordinance will be observed and substantial justice done. The variance must be necessary to permit development of a specific parcel of land which differs from other parcels of land by being of such a restrictive area, shape, or slope that it cannot be developed in a manner commensurate with the development upon other parcels of land in districts with the same zoning classification. A variance may not be granted to relieve a self created or personal hardship, nor for financial reasons only, nor may a variance be granted to permit any person a privilege in developing a parcel of land not

permitted by this chapter to other parcels of land in districts with the same zoning classification.

(d) *Meetings, Records and Rules.*

(1) All meetings and hearings of the board must be open to the public in accordance with the Texas Open Meetings Act, Article 6252-17, Vernon's Texas Civil Statutes.

(2) All records of the board are public records open to inspection at reasonable times and upon reasonable notice in accordance with the Texas Open Records Act, Article 6252-17a, Vernon's Texas Civil Statutes.

(3) The board shall adopt rules not inconsistent with this code or state law to govern its proceedings.

(e) *Effect of Decisions.*

The board's decision is final unless appealed to the district court within 10 days in accordance with Article 1011g, Vernon's Texas Civil Statutes.

* * *

SEC. 51-3.104. DEPARTMENT OF PLANNING AND DEVELOPMENT.

(a) *Creation; Membership; Appointment.* There is hereby created the department of planning and development consisting of the director of planning and development and such assistants and employees as the city council may provide for upon the recommendation of the city manager. The director shall be appointed by the city manager.

(b) *Powers and Duties.* The director shall perform the following duties and have the following powers:

(1) advise the city manager on matters affecting the urban design and physical development of the city;

(2) develop and recommend to the city manager a comprehensive plan for the city;

(3) review and make recommendations regarding proposed actions implementing the comprehensive plan;

(4) participate in the preparation and revision of the capital improvement program;

(5) administer the regulations governing the subdivision and platting of land in accordance with state and local laws;

(6) coordinate all planning relating to urban redevelopment, urban rehabilitation, and conservation intended to alleviate or prevent slums, obsolescence, blight, or other conditions of urban deterioration;

(7) give advice and provide staff assistance to the board of adjustment and the plan and zoning commission in the exercise of their responsibilities;

(8) perform all other duties required of him by the city manager or by ordinance. (Ord. Nos. 17226; 17393)

SEC. 51-3.105. BUILDING OFFICIAL.

(a) *Powers and Duties.*

(1) The building official shall issue permits in accordance with this chapter.

(2) The building official shall issue certificates of occupancy in accordance with this chapter.

(3) The building official has the authority to enforce the provisions of this chapter.

* * *

SEC. 51-7.705. DETERMINATION OF NONCOMMERCIAL MESSAGES.

(a) *Findings.* The city council finds that it may be necessary in the enforcement of this article to determine whether the message displayed upon a sign is a commercial message or a noncommercial message.

(b) *Hearing.* If a person receives a notice of violations or is cited for maintaining an illegal sign, and the person notifies the city attorney in writing within 10 days of receiving the notice or citation that he believes the sign displays a noncommercial message and is, therefore, not in violation of this article, the city attorney shall postpone prosecution of the case and shall have the matter placed on the agenda of the sign control board of adjustment for appeal under Section 51-7.703(e) of this article. The board shall give the person maintaining the sign 10 days written notice of a public hearing on the matter. After hearing the evidence, the board shall decide whether the message displayed on the sign is commercial or noncommercial. No fee may be charged for this appeal.

(c) *Judicial Review.* If the board decides that the message is commercial and that the sign is illegal, the person maintaining the sign may within 10 days of the board's decision file a notice of nonacceptance of the decision with the city attorney. Within three days after receiving

notice of nonacceptance, the city attorney shall initiate suit in the district court for determination that the sign is commercial and for an injunction to prohibit display of the sign in violation of this article. The city shall bear the burden of showing that the sign is commercial. In computing the three-day time period, Saturdays, Sundays, and legal holidays are excluded.

(d) When the tenure of the sign control board of adjustment expires, hearings under Subsection (b) will be before the board of adjustment. (Ord. 18202)

CHAPTER 6A

AMUSEMENT CENTERS

- Sec. 6A-1. Definitions.
- Sec. 6A-2. License required.
- Sec. 6A-3. Reserved.
- Sec. 6A-4. License application.
- Sec. 6A-5. Fee.
- Sec. 6A-6. License display, replacement, and transferability.
- Sec. 6A-7. Refusal to issue or renew license.
- Sec. 6A-8. License revocation.
- Sec. 6A-9. Appeal from refusal to issue or renew license; from decision to revoke license.
- Sec. 6A-10. Hours of operation.
- Sec. 6A-11. Responsibility of licensee.

SEC. 6A-1. DEFINITIONS.

In this chapter:

(1) **AMUSEMENT CENTER** means a business establishment in which at least 25 percent of the public floor area is devoted to coin-operated amusement devices and their public use. If a billiard hall, as defined in Chapter 9A of this code, occupies a portion of a business establishment, the billiard hall floor area shall not be included in determining the total public floor area of the establishment.

(2) **COIN-OPERATED AMUSEMENT DEVICE** means a machine or device operated by insertion of a coin, token or similar object, for the purpose of amusement or skill. This term does not include:

- (A) musical devices;
- (B) billiard tables;

(C) machines designed exclusively for children;
or

(D) devices designed to train persons in athletic skills or golf, tennis, baseball, archery, or other similar sports.

(3) CHIEF OF POLICE means the chief of police of the city of Dallas or his designated agent.

(4) LICENSEE means a person licensed to operate an amusement center.

(5) OPERATOR means a person who manages or controls an amusement center.

(6) PERSON means an individual, assumed name entity, partnership, joint-venture, association, or other legal entity. (Ord. 14736; Ord. 14932)

SEC. 6A-2. LICENSE REQUIRED.

No person may operate an amusement center in the city without first obtaining a license from the chief of police. (Ord. 14736)

SEC. 6A-3. RESERVED.

(Repealed by Ord. 14932)

SEC. 6A-4. LICENSE APPLICATION.

(a) An applicant for a license shall file with the chief of police a written application on a form provided for that purpose, which shall be signed by the applicant, who shall be the owner of the amusement center. Should

an applicant maintain an amusement center at more than one location, a separate application must be filed for each location. The following information is required in the application:

(1) Name, address, and telephone number of the applicant, including the trade name by which applicant does business and the street address of the amusement center, and if incorporated, the name registered with the Secretary of State;

(2) Name, address, and telephone number of the operator of the amusement center and proof that the operator is at least 18 years of age;

(3) Whether the applicant, operator, and, if applicable, any corporate officer of the applicant has been convicted of a felony or within the preceding five years of an offense involving drugs, gambling, prostitution, obscenity, or unlawfully carrying a weapon;

(4) The previous occupation of the applicant, operator, and, if applicable, all corporate officers of the applicant within the preceding five years;

(5) Whether a previous license of applicant, or, if applicable, corporate officer of applicant has been revoked within two years of filing of the application;

(6) Number of coin-operated amusement devices in the center; and

(7) A statement that all the facts contained in the application are true.

(b) The chief of police may require additional information of an applicant or licensee to clarify items on the application.

(c) No applicant may maintain an amusement center in violation of the comprehensive zoning ordinance of the city. (Ord. 14736; Ord. 14932)

SEC. 6A-5. FEE.

The annual fee for an amusement center license is \$7.50 for each coin-operated amusement device located in the center. Amusement center licenses expire one year from the date of issuance. The fee for issuing a replacement license for one lost, destroyed, or mutilated is \$2. The fee is payable to the department of revenue and taxation upon approval of the license by the chief of police. No refund of license fees will be made. (Ord. 14736)

SEC. 6A-6. LICENSE DISPLAY, REPLACEMENT, AND TRANSFERABILITY.

(A) Each license issued pursuant to this article must be posted and kept in a conspicuous place in the amusement center and must state the number of coin-operated amusement devices for which the license was issued.

(b) A replacement license may be issued for one lost, destroyed, or mutilated, upon application on a form provided by the chief of police. A replacement license shall have the word "REPLACEMENT" stamped across its face and shall bear the same number as the one it replaces.

(c) An amusement center license is not assignable or transferable.

(d) A licensee shall notify the chief of police within 10 days of a change or partial change in the ownership or management of the amusement center, or a change of address or trade name. (Ord. 14736)

SEC. 6A-7. REFUSAL TO ISSUE OR RENEW LICENSE.

The chief of police shall refuse to approve issuance or renewal of an amusement center license for one or more of the following reasons:

(1) A false statement as to a material matter made in an application for a license;

(2) Conviction of the applicant, his operator, or corporate officer of the applicant of a felony or within the preceding five years of an offense involving drugs, gambling, prostitution, obscenity, or unlawfully carrying a weapon; or

(3) Revocation of a license, pursuant to this chapter, of the applicant or corporate officer of the applicant within two years preceding the filing of the application. (Ord. 14736; Ord. 14932)

SEC. 6A-8. LICENSE REVOCATION.

(a) The chief of police shall revoke an amusement center license for one or more of the following reasons:

(1) A false statement as to a material matter made in an application for a license, license renewal or a hearing concerning the license;

(2) Conviction of the licensee, his operator, or corporate officer of the licensee of a felony or an offense involving drugs, gambling, prostitution, obscenity, or unlawfully carrying a weapon.

(3) Conviction twice within a one year period of the licensee or his operator for a violation of the hours of operation provision of this chapter;

(4) Employment by the licensee of an operator who is under 18 years of age;

(5) Operation of an amusement center containing more coin-operated amusement devices than the center is licensed for; or

(6) Violation by the licensee or his operator of Section 6A-11 of this chapter.

(b) The chief of police shall send written notice of revocation to a licensee by certified mail, return receipt requested, setting forth the reasons for the revocation. (Ord. 14736; Ord. 14932)

SEC. 6A-9. APPEAL FROM REFUSAL TO ISSUE OR RENEW LICENSE; FROM DECISION TO REVOKE LICENSE.

If the chief of police refuses to approve the issuance of a license or the renewal of a license to an applicant, or revokes a license issued to a licensee under this article, this action is final unless the applicant or licensee, within 10 days after the receipt of written notice of the action, files with the city manager a written appeal. The city manager shall, within 10 days after the appeal is filed, consider all the evidence in support of or against the

action appealed, and render a decision either sustaining or reversing the action. If the city manager sustains the action, the applicant or licensee may, within 10 days of that decision file a written appeal with the city secretary to the city council setting forth specific grounds for the appeal. The city council shall, within 30 days, grant a hearing to consider the action. The city council has authority to sustain, reverse, or modify the action appealed. The decision of the city council is final. (Ord. 14736)

SEC. 6A-10. HOURS OF OPERATION.

(a) Except as provided in Subsection (b) or (c) of this section, no licensee or his operator may operate the amusement center between the hours of 12:01 a.m. to 9 a.m., Monday through Friday, and between the hours of 2 a.m. to 9 a.m., Saturday and Sunday.

(b) If an amusement center is within 500 feet of a district restricted to residential use under the Comprehensive General Zoning Ordinance of the City of Dallas, no licensee or his operator may operate the amusement center except between the hours of 9 a.m. to 11 p.m., Sunday through Thursday, and between the hours of 9 a.m. to 12 midnight, Friday and Saturday.

(c) If an amusement center is within 500 feet of a public or private elementary or secondary school, no licensee or his operator may operate the amusement center between the hours of 9 a.m. to 4 p.m. during the fall or spring term when students are required to attend school in the school district in which the center is located.

(d) For purposes of this chapter measurements shall be made in a straight line without regard to intervening structures or objects, from the nearest entry door in the portion of the building used as an amusement center to the nearest point of a district restricted to residential use or nearest entry door of a school.

(e) If an amusement center's hours are restricted only by Subsection (a) of this section, a licensee may obtain a temporary permit to operate continuously. The chief of police shall issue a temporary permit for no longer than 30 days and only once a year. (Ord. 14736; Ord. 14932; Ord. 16586)

SEC. 6A-11. RESPONSIBILITY OF LICENSEE.

(a) A licensee or his operator may not permit any of the following activities within the amusement center:

(1) violation of any possession, sale, or delivery provision in Subchapter 4 of the Texas Controlled Substances Act;

(2) violation of any provision in Article 666-17 (14) of the Texas Liquor Control Act;

(3) prostitution;

(4) gambling; or

(5) entry of a person younger than 17 years between the hours of 9 a.m. to 3 p.m. during the fall or spring term when students are required to attend school in the school district in which the center is located.

(b) A licensee or his operator may not permit any of the following activities on premises of the amusement center:

- (1) violation of Section 42.01 of the Penal Code; or
- (2) violation of Chapter 7A of the Dallas City Code.

(c) In Subsection (b) of this section, "premises" means an area, other than the interior of an amusement center, to which the public or a substantial group of the public has access and which is under the control of an owner or operator of an amusement center, such as a parking facility or private sidewalk. (Ord. 14736; Ord. 14932)

CHAPTER 14

DANCE HALLS

- Sec. 14-1. Definitions.
- Sec. 14-2. License required.
- Sec. 14-3. Issuance of license; posting.
- Sec. 14-4. Fees.
- Sec. 14-5. Hours of operation.
- Sec. 14-6. Inspection.
- Sec. 14-7. Dance hall supervisor.
- Sec. 14-8. Persons under 17 prohibited.
- Sec. 14-9. Expiration of license.
- Sec. 14-10. Suspension.
- Sec. 14-11. Revocation.
- Sec. 14-12. Appeal.
- Sec. 14-13. Transfer of license.

SEC. 14-1 DEFINITIONS.

In this chapter:

(1) DANCE HALL means a place where dancing is permitted.

(2) CLASS A DANCE HALL means any place where dancing is permitted three days or more a week.

(3) CLASS B DANCE HALL means any place where dancing is permitted less than three days a week.

(4) CLASS C DANCE HALL means any place where dancing is scheduled one day at a time.

(5) CLASS D DANCE HALL means any place where instruction in dancing is given for consideration.

(6) LICENSE means a permit to operate a dance hall.

(7) **LICENSEE** means a person in whose name a license to operate a dance hall has been issued, as well as the individual listed as an applicant on the application for a dance hall license.

(8) **PERSON** means an individual, partnership, corporation, association, or other legal entity.

(9) **PRIVATE CLUB** means an association of persons for the promotion of some common object, which operates not for a profit a place for the accommodation of its members and guests only. (Ord. 15721)

SEC. 14-2. LICENSE REQUIRED.

(a) A person commits an offense if he operates a dance hall without a license.

(b) An application for a license must be made on a form provided by the chief of police. The applicant must be qualified according to the provisions of this chapter and his premises must be inspected and found to be in compliance with the law by the health department, fire department, and building official.

(c) A person who wishes to operate a dance hall must sign the application for a license as applicant. If a person who wishes to operate a dance hall is other than an individual, each individual who has a 20 percent or greater interest in the business must sign the application for a license as an applicant. A person who wishes to operate a Class D dance hall must give the name and address of each person who is an instructor. Each applicant must meet the requirements of Section 14-3(a) and

each applicant shall be considered a licensee if a license is granted.

(d) It is a defense to prosecution under this section that the actor is conducting a dance at:

(1) a private residence from which the general public is excluded;

(2) a place owned by the federal, state, or local government;

(3) a public or private elementary school, secondary school, college or university;

(4) a place owned by a religious organization; or

(5) a private club.

(e) A person who possesses a valid dance hall license shall not be required to obtain a license as a theater in accordance with the provisions of Chapter 46 of this Code if live performances are presented to the public for an admission fee, cover charge, or other consideration and the operation of the dance hall is in compliance with the provisions of this chapter. (Ord. 15721)

SEC. 14-3. ISSUANCE OF LICENSE; POSTING.

(a) The chief of police shall issue a license to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:

(1) An applicant is under 18 years of age.

(2) An applicant or an applicant's spouse is not of good moral character, and his reputation for being peaceable and law-abiding in the community where he resides or does business is bad.

(3) An applicant or an applicant's spouse is overdue in his payment to the city of taxes, fees, fines, or penalties assessed against him or imposed upon him.

(4) An applicant uses alcoholic beverages to excess.

(5) An applicant is physically or mentally incapacitated to an extent that he cannot operate a dance hall.

(6) An applicant has failed to answer or falsely answered a question or request for information on the application form provided.

(7) An applicant or an applicant's spouse has been convicted of a violation of a provision of this chapter, other than the offense of operating a dance hall without a license, within two years immediately preceding the application. The fact that a conviction is being appealed shall have no effect.

(8) An applicant is residing with a person who has been denied a license by the city to operate a dance hall within the preceding 12 months, or residing with a person whose license to operate a dance hall has been revoked within the preceding 12 months.

(9) An applicant's premises have not been approved by the health department, fire department, and the building official.

(10) The license fee required by this chapter has not been paid.

(11) An applicant or an applicant's spouse has been convicted of:

(A) a felony; or

(B) a misdemeanor involving an offense of:

(i) prostitution,

(ii) promotion of prostitution,

(iii) public lewdness,

(iv) gambling,

(v) violation of the Texas Controlled Substances and Dangerous Drugs Act, or

(vi) unlawfully carrying a weapon;

and five years have not elapsed since the termination of any sentence, parole, or probation. The fact that a conviction is being appealed shall have no effect.

(12) An applicant has been employed in a dance hall in a managerial capacity within the preceding 12 months and has demonstrated that he is unable to operate or manage a dance hall premises in a peaceful and law abiding manner.

(b) The license shall state on its face the name of the person to whom it is granted, the expiration date, the address of the dance hall, and whether it is issued for a Class A, Class B, Class C, or Class D dance hall.

(c) The license shall be posted in a conspicuous place at or near the entrance to the dance hall so that it may be easily read at any time. (Ord. 15721; Ord. 16067)

SEC. 14-4. FEES.

The following non-refundable fees shall be charged for each license issued under the terms of this chapter:

(a) For a Class A dance hall, the annual license fee is \$250.00;

(b) For a Class B dance hall, the annual license fee is \$125.00;

(c) For a Class C dance hall, the daily license fee is \$10.00;

(d) For a Class D dance hall, the annual license fee is \$25.00. (Ord. 15721)

SEC. 14-5. HOURS OF OPERATION.

(a) A person commits an offense if he operates a Class A, Class B, or Class C dance hall between the hours of 2:00 a.m. and 7:00 a.m., Monday through Saturday, or between 2:00 a.m. and 12:00 noon on Sunday.

(b) A person commits an offense if he operates a Class D dance hall between the hours of 12 midnight and 7:00 a.m. (Ord. 15721)

SEC. 14-6. INSPECTION.

(a) Representatives of the police department, health department, fire department, and housing and urban

rehabilitation department may inspect the premises of a dance hall for the purpose of insuring compliance with the law, at any time it is open for business or occupied.

(b) A person who operates a dance hall or person designated as the dance hall supervisor commits an offense if he refuses to permit a lawful inspection of the premises of a dance hall by a representative of the police department at any time it is open for business or occupied. (Ord. 15721)

SEC. 14-7. DANCE HALL SUPERVISOR.

(a) A person who operates a dance hall must designate a person as dance hall supervisor and register his name with the chief of police.

(b) A person designated dance hall supervisor must remain on the premises of the dance hall during the time dancing is permitted and until 30 minutes after the end of the dance to insure that the dance is conducted in an orderly manner. (Ord. 15721)

SEC. 14-8. PERSONS UNDER 17 PROHIBITED.

(a) No person under the age of 17 years may enter a Class A, Class B or Class C dance hall unless accompanied by a parent or guardian.

(b) A person commits an offense if he falsely represents himself to be either a parent or guardian of a person under the age of 17 years for the purpose of gaining the person's admittance into a dance hall.

(c) A licensee or employee of a Class A, Class B, or Class C dance hall commits an offense if he knowingly allows a person under the age of 17 years to enter or remain on the premises of the dance hall unless he is accompanied by his parent or guardian. (Ord. 15721)

SEC. 14-9. EXPIRATION OF LICENSE.

(a) A license for a Class A, Class B, or Class D dance hall shall expire one year from the date of issuance and may be renewed only by making application as provided in Section 14-2. Application for renewal should be made at least 30 days before the expiration date, and when made less than thirty days before the expiration date the expiration of the license will not be affected.

(b) A license for a Class C dance hall shall expire at 2:00 a.m. on the day following the date of the dance.

(c) When the chief of police denies renewal of a license, the applicant shall not be issued a license for one year from the date denial becomes final. If, subsequent to denial, the chief of police finds that the basis for denial of the renewal license has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date denial became final. (Ord. 15721)

SEC. 14-10. SUSPENSION.

The chief of police shall suspend a dance hall license for a period of time not exceeding 30 days if he determines that a licensee or an employee of a licensee has:

(1) violated Sections 14-3(c), 14-5, 14-8, or 14-13 of this chapter;

(2) engaged in excessive use or alcoholic beverages while on the dance hall premises;

(3) refused to allow an inspection of the dance hall premises as authorized in this chapter;

(4) knowingly permitted an intoxicated person to remain on the premises;

(5) knowingly permitted gambling by any person on the dance hall premises; or

(6) demonstrated inability to operate or manage a dance hall premises in a peaceful and law abiding manner, thus necessitating action by law enforcement officers. (Ord. 15721)

SEC. 14-11. REVOCATION.

(A) The chief of police shall revoke a license if a cause of suspension in Section 14-10 occurs and the license has been suspended within the preceding 12 months.

(b) The chief of police shall revoke a license if he determines that:

(1) a licensee has given false or misleading information in the material submitted to the chief of police during the application process;

(2) a licensee or an employee is unable to lawfully operate the dance hall because of physical or mental impairment;

(3) a licensee or an employee has knowingly allowed possession, use, or sale of controlled substances on the premises;

(4) a licensee or an employee has knowingly allowed prostitution on the premises; or

(5) a licensee or an employee knowingly permitted a customer to dance during a period of time when the dance hall license was suspended.

(6) A licensee has been convicted of:

(A) a felony; or

(B) a misdemeanor involving an offense of:

(i) prostitution,

(ii) promotion of prostitution,

(iii) public lewdness,

(iv) gambling,

(v) violation of the Texas Controlled Substances and Dangerous Drugs Act, or

(vi) unlawfully carrying a weapon;

and five years have not elapsed since the termination of any sentence, parole, or probation. The fact that a conviction is being appealed shall have no effect.

(c) when the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a dance hall license for one year from the date revocation became final. If, subsequent to revocation, the chief of police finds that the basis for the

revocation action has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date the revocation became final. If the license was revoked under Subsection 6, and applicant may not be granted another license. (Ord. Nos. 15721; 16067)

SEC. 14-12. APPEAL.

If the chief of police denies the issuance of a license, or suspends or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action and the right to an appeal. The aggrieved party may appeal the decision of the chief of police to a permit and license appeal board in accordance with Section 2-96 of this code. The filing of an appeal stays the action of the chief of police in suspending or revoking a license until the permit and license appeal board makes a final decision. (Ord. Nos. 15721; 16067; 18200)

SEC. 14-13. TRANSFER OF LICENSE.

A licensee shall not transfer his license to another, nor shall a licensee operate a dance hall under the authority of a license at any place other than the address designated in the application. (Ord. 15721)

CHAPTER 46

THEATERS

ARTICLE I. IN GENERAL.

Sec. 46-1.	Definitions.
Sec. 46-2.	Classifications.
Sec. 46-3.	License required.
Sec. 46-4.	Issuance of license.
Sec. 46-5.	Fees.
Sec. 46-6.	Hours of operation.
Sec. 46-7.	Inspection.
Sec. 46-8.	Expiration of license.
Sec. 46-9.	Suspension.
Sec. 46-10.	Revocation.
Sec. 46-11.	Appeal.
Sec. 46-12.	Reserved.
Sec. 46-12.1	Transfer of license.
Sec. 46-12.2	Spieling prohibited.
Sec. 46-12.3	Prohibiting exhibition of certain sexually explicit films in specified areas.
Sec. 46-12.4	Measurement of distances.

ARTICLE II.

MOTION PICTURE CLASSIFICATION.

Sec. 46-13.	Definitions.
Sec. 46-14.	Motion picture classification board established.
Sec. 46-15.	Classification procedure.
Sec. 46-16.	Judicial review.
Sec. 46-17.	Certain acts declared public nuisances.
Sec. 46-18.	Unlawful acts.
Sec. 46-19.	Defense.
Sec. 46-20.	Advertisement.

ARTICLE I - IN GENERAL

SEC. 46-1. DEFINITIONS.

In this chapter:

(1) A PUBLIC HOUSE OF AMUSEMENT means a structure that is used as a theater, moving picture theater, moving picture show, or orchestral concert hall.

(2) THEATER means a structure, including but not limited to a hotel, restaurant, tavern, and other comparable establishment, in which dance, drama, opera, musical, or other similar live performances are presented to the public for an admission fee, cover charge, or other consideration.

(3) MOVING PICTURE SHOW means a structure in which moving picture films are exhibited to the public for an admission fee, cover charge, or other consideration.

(4) MOVING PICTURE THEATER means a structure which is used as a theater and moving picture show.

(5) ORCHESTRAL CONCERT HALL means a structure in which vocal or instrumental musical concerts are presented to the public for an admission fee, cover charge or other consideration.

(6) LICENSE means a permit to operate a public house of amusement.

(7) LICENSEE means the person in whose name a license to operate a public house of amusement has been issued, as well as the individual(s) listed as applicant(s) on the application for a public house of amusement.

(8) PERSON means an individual, partnership, company, corporation, association, firm, organization, institution, or similar entity. (Ord. 16210)

46-2. CLASSIFICATION.

Public houses of amusement are hereby classified as follows:

- (1) Theaters.
- (2) Moving picture theaters.
- (3) Moving picture shows.
- (4) Orchestral concert halls. (Ord. 16210)

SEC. 46-3. LICENSE REQUIRED.

(a) A person commits an offense if he operates a public house of amusement without a valid license, issued by the city for the particular class of house operated.

(b) An application for a license must be made on a form provided by the chief of police. The applicant must be qualified according to the provisions of this chapter and the premises must be inspected and found to be in compliance with the law by the health department, fire department, and building official.

(c) If a person who wishes to operate a public house of amusement is an individual, he must sign the application for a license as applicant. If a person who wishes to operate a public house of amusement is other than an individual, each individual who has a 20 percent or greater interest in the business must sign the application

for a license as applicant. Each applicant must meet the requirements of Section 46-4, and each applicant shall be considered a licensee if a license is granted.

(d) It is a defense to prosecution under this section that a theater, moving picture theater, moving picture show, or orchestral concert hall is operated by a:

(1) church, temple, synagogue, or other nonprofit religious organization;

(2) governmental entity;

(3) nonprofit civic or social organization;

(4) proprietary school which is licensed by the state;

(5) public or private elementary or secondary school;

(6) college, junior college, or university which is supported entirely or partially by taxes; or

(7) private college or university that maintains and operates educational programs from which credits are transferable to a college, junior college, or university that is supported entirely or partially by taxes.

(e) A person who possesses a valid dance hall license is not required to obtain a public house of amusement license for a theater if live performances are presented to the public for an admission fee, cover charge, or other consideration and the operation of the dance hall is otherwise in compliance with the provisions of Chapter 14 of this code.

--(f) The securing of a license entitles the holder of the license to operate the classification of public house of amusement for which license was issued, and also, without additional license, to operate a public house of amusement for which a lower license fee is charged, but not a public house of amusement for which a higher fee is charged. (Ord. 16210)

SEC. 46-4. ISSUANCE OF LICENSE.

(a) The Chief of Police shall approve the issuance of a license by the Assessor and Collector of Taxes to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:

- (1) An applicant is under 18 years of age;
- (2) An applicant or applicant's spouse is not of good moral character and his reputation for being peaceable and law-abiding in the community where he resides or does business is bad;
- (3) An applicant or an applicant's spouse is overdue in his payment to the city of taxes, fees, fines, or penalties assessed against him or imposed upon him;
- (4) An applicant uses alcoholic beverages to excess;
- (5) An applicant is physically or mentally incapacitated to an extent he cannot properly operate a public house of amusement;
- (6) An applicant has failed to answer or has falsely answered a question or request for information on the application form provided;

(7) An applicant or an applicant's spouse has been convicted of a violation of a provision of this chapter, other than the offense of operating a public house of amusement without a license, within two years immediately preceding the application. The fact that a conviction is being appealed shall have no effect.

(8) An applicant is residing with a person who has been denied a license by the city to operate a public house of amusement within the preceding 12 months, or residing with a person whose license to operate a public house of amusement has been revoked within the preceding 12 months.

(9) An applicant's premises have not been approved by the health department, fire department, and the building official.

(10) The license fee required by this chapter has not been paid.

(11) An applicant or an applicant's spouse has been convicted of:

(A) a felony; or

(B) a misdemeanor involving an offense of:

(i) prostitution,

(ii) promotion of prostitution,

(iii) public lewdness,

(iv) gambling,

(v) violation of the Texas Controlled Substances and Dangerous Drugs Act, or

(vi) unlawfully carrying a weapon;

and five years have not elapsed since the termination of any sentence, parole, or probation. The fact that a conviction is being appealed shall have no effect.

(12) An applicant has been employed in a public house of amusement in a managerial capacity within the preceding 12 months and has demonstrated that he is unable to operate or manage a public house of amusement premises in a peaceful and law-abiding manner.

(b) The license, if granted, shall state on its face the name of the person to whom it is granted, the expiration date, and the address of the public house of amusement. The license shall be posted in a conspicuous place at or near the entrance of the public house of amusement so that it may be easily read at any time. (Ord. 16210)

SEC. 46-5. FEES.

The following non-refundable fees shall be charged for each classification of public house of amusement license issued under the terms of this chapter:

(a) For a theater, the annual license fee is \$150;

(b) For a moving picture theater, the annual license fee is \$75;

(c) For a moving picture show, the annual license fee is \$65;

(d) For an orchestral concert hall, the annual license fee is \$25. (Ord. 16210)

SEC. 46-6. HOURS OF OPERATION.

A person commits an offense if he operates a public house of amusement between the hours and 2:00 a.m. and 7:00 a.m.; Monday through Saturday, or between the hours of 2:00 a.m. and 12 noon Sunday. (Ord. 16210)

SEC. 46-7. INSPECTION.

(a) Representatives of the police department, health department, fire department, tax department, and housing and urban rehabilitation department may inspect the premises of a public house of amusement for the purpose of insuring compliance with the law, at any time it is open for business or occupied.

(b) A person who operates a public house of amusement or his agent or employee commits an offense if he refuses to permit a lawful inspection of the premises of a public house of amusement by a representative of the police department at any time it is open for business or occupied. (Ord. 16210)

SEC. 46-8. EXPIRATION OF LICENSE.

(a) Each license shall expire one year from the date of issuance and may be renewed only by making application as provided in Section 46-3. Application for renewal should be made at least 30 days before the expiration date, and when made less than 30 days before the expiration date, the expiration of the license will not be affected.

(b) When the chief of police denies renewal of a license, the applicant shall not be issued a license for one year from the date of denial. If, subsequent to denial, the chief of police finds that the basis for denial of the renewal license has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date denial became final. (Ord. 16210)

SEC. 46-9. SUSPENSION.

The chief of police shall suspend a license for a period not to exceed 30 days if he determines that a licensee or an employee of a licensee has:

(1) violated Section 46-6, Section 46-7, Section 46-12.1, Section 46-12.2, or Section 46-12.3 of this chapter;

(2) engaged in excessive use of alcoholic beverages while on the public house of amusement premises;

(3) refused to allow an inspection of the public house of amusement premises as authorized by this chapter;

(4) knowingly permitted gambling by any person on the public house of amusement premises;

(5) demonstrated inability to operate or manage a public house of amusement premises in a peaceful and law-abiding manner thus necessitating action by law enforcement officers. (Ord. 16210)

SEC. 46-10. REVOCATION.

(a) The chief of police shall revoke a license if a cause of suspension in Section 46-9 occurs and the license has been suspended within the preceding 12 months.

(b) The chief of police shall revoke a license if he determines that:

(1) a licensee has given false or misleading information in the material submitted to the chief of police during the application process;

(2) a licensee or an employee is unable to lawfully operate the public house of amusement because of physical or mental impairment;

(3) a licensee or an employee has knowingly allowed possession, use, or sale of controlled substances on the premises;

(4) a licensee or an employee has knowingly allowed prostitution on the premises; or

(5) a licensee or employee knowingly operates a public house of amusement during a period of time when the licensee's license was suspended; or

(6) a licensee has been convicted of:

(A) a felony; or

(B) a misdemeanor involving an offense of:

(i) prostitution,

(ii) promotion of prostitution,

(iii) public lewdness;

(iv) gambling,

(v) violation of the Texas Controlled Substances and Dangerous Drugs act, or

(vi) unlawfully carrying a weapon;

and five years have not elapsed since the termination of any sentence, parole, or probation. The fact that a conviction is being appealed shall have no effect.

(c) When the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a public house of amusement license for one year from the date revocation became final. If, subsequent to revocation, the chief of police finds that the basis for the revocation actions has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date the revocation became final. If the license was revoked under Subsection 6, an applicant may not be granted another license. (Ord. 16210)

SECTION 46-11. APPEAL.

(a) If the chief of police denies the issuance of a license, or suspends or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action and the right to an appeal. The aggrieved party may appeal the decision of the chief of police to the city manager within 10 days after receipt of the notice from the chief of police. The action of the chief of police is final unless a timely appeal is made. The filing of an appeal stays the action of the chief of police in suspending or revoking a license until the city manager, or his designee, makes a final decision.

(b) The city manager, or his designated representative, shall serve as hearing officer and consider evidence

offered by any interested person. The formal rules of evidence do not apply to an appeal hearing under this section; the hearing officer shall make his decision on the basis of a preponderance of the evidence presented at the hearing. The hearing officer must render a final decision within 30 days after the request for a hearing is filed. The hearing officer shall affirm, reverse, or modify the action of the chief of police. The decision of the hearing officer is final unless the applicant or licensee files a written request with the city secretary for a hearing before the license appeal board within 10 days after receipt of notice of the action of the hearing officer.

(c) If a written request for an appeal hearing is filed with the city secretary within the 10 day limit, the city council shall appoint three city council members to serve as a license appeal board and shall set a date for the hearing. The license appeal board shall hear and consider evidence offered by any interested person. The formal rules of evidence do not apply. The license appeal board shall decide the appeal on the basis of a preponderance of the evidence presented at the hearing if there is a dispute as to fact, otherwise the board shall decide the appeal in accordance with the express provisions of this chapter. The board shall affirm, reverse, or modify the action of the hearing officer by a majority vote. Failure to reach a majority decision on a motion shall leave the hearing officer's decision unchanged. The decision of the license appeal board is final. (Ord. 16210)

SEC. 46-12. RESERVED.

(Repealed by Ord. 16210)

SEC. 46-12.1. TRANSFER OF LICENSE.

A licensee shall not transfer his license to another, nor shall a licensee operate a public house of amusement under the authority of a license at any place other than the address designated in the application. (Ord. 16210)

SEC. 46-12.2. SPIELING PROHIBITED.

A person commits an offense if he stands in front of, or is on any public street in front of, any public house of amusement, and by spieling or loud talking, seeks to induce passersby to enter or patronize the public house of amusement. (Ord. 16210)

SEC. 46-12.3 PROHIBITING EXHIBITION OF CERTAIN SEXUALLY EXPLICIT FILMS IN SPECIFIED AREAS.

(a) A person commits an offense if he operates or causes to be operated within 1000 feet of a church, public or private elementary or secondary school, district restricted to residential use by the Comprehensive Zoning Ordinance of the city, or public park adjacent to a district restricted to residential use a moving picture show or moving picture theater which exhibits a film that explicitly depicts:

(1) contact between any part of the genitals of one person and the genitals, mouth, or anus of another person;

(2) contact between a person's mouth, anus, or genitals and the mouth, anus, or genitals of an animal or fowl;

(3) manipulation of a person's genitals;

(4) defecation; or

(5) urination.

(b) It is a defense to prosecution under Subsection (a) that the moving picture theater or moving picture show was being operated lawfully as a moving picture theater or moving picture show at the same location and upon the same premises upon the effective date of this subsection and has continuously operated at that location as a moving picture theater or moving picture show. (Ord. Nos. 16210, 16270)

SEC. 46-12.4. MEASUREMENT OF DISTANCES.

For the purposes of this article, measurement shall be made in straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises where a theater or show is conducted to the nearest property line of the premises of a church or public or private elementary or secondary school, or to the nearest boundary of a district restricted to residential use. (Ord. 16210)

ARTICLE II.

MOTION PICTURE CLASSIFICATION

SEC. 46-13. DEFINITIONS.

(a) In this article:

(1) **ADVERTISEMENT** means material which is designed to attract the attention of the public to a film and is displayed by use of a newspaper.

(2) **BOARD** means the Dallas Motion Picture Classification Board.

(3) **FILE** means to deliver to the director of consumer services.

(4) **FILM** means a motion picture, but does not include a motion picture which depicts current events or news.

(5) **INITIAL EXHIBITION** means the first public showing of a film in the city.

(6) **INTERESTED PARTY** means a film distributor or exhibitor who has a monetary interest in a film.

(7) **NOT SUITABLE FOR YOUNG PERSONS** means a film:

(A) which depicts sexual conduct, nudity, defecation, or urination in a manner which is patently offensive to the average person applying contemporary community standards with respect to what is suitable for viewing by young persons; and which, taken as a whole:

(i) appeals to the prurient interest of young persons; and

(ii) lacks serious literary, artistic, political, or scientific value for young persons; or

(B) which explicitly depicts the infliction of serious bodily injury by a person upon another person or animal, or which explicitly depicts a person inflicting

serious damage to or destroying property, and the infliction of injury, damage, or destruction is:

(i) an intentional act;

(ii) depicted without the express portrayal of significant adverse legal, physical, emotional, or societal consequences to the person who inflicts the injury, damage, or destruction; and

(iii) contrary to contemporary community legal, ethical, or moral standards; or

(C) which explicitly depicts serious bodily injury to a person, and the depiction of the injury is patently offensive to the average person applying contemporary community standards with respect to what is suitable for viewing by young persons.

(8) NUDITY means a human bare buttock, anus, male genitals, female genitals, or female breast.

(9) OBSCENE LANGUAGE means spoken words which are lewd, lascivious, or filthy.

(10) PROPERTY means:

(A) real property; or

(B) tangible personal property, including anything severed from land.

(11) PRURIENT INTEREST means a shameful or morbid interest in sexual conduct, nudity, defecation, or urination.

(12) RECKLESS means a person's mental state with respect to circumstances surrounding his conduct or

the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's standpoint.

(13) **SERIOUS BODILY INJURY** means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of any bodily member or organ.

(14) **SERIOUS DAMAGE** means damage to property which results in a substantial pecuniary loss to the owner or a third person.

(15) **SEXUAL CONDUCT** means:

(A) any contact between any part of the genitals of one person and the genitals, mouth, or anus of another person;

(B) any contact between a person's mouth, anus, or genitals and the mouth, anus, or genitals of animal or fowl; or

(C) any manipulation of a person's genitals.

(16) **YOUNG PERSON** means a person who is under the age of 16 years.

(b) In computing a period of time prescribed or allowed under this article, the day of an act or event is not included in the computation of the time period. The

last day of the period of time is included in the computation unless that day is a Saturday, Sunday or legal holiday, in which event the next day following which is not a Saturday, Sunday, or legal holiday is included in the computation. (Ord. Nos. 12169; 14862; 14930; 15365; 16133; 17517)

SEC. 46-14. MOTION PICTURE CLASSIFICATION BOARD ESTABLISHED.

(a) There is created a board to be known as the motion picture classification board composed of a chairman, vice-chairman and 24 other members to be appointed by the city council. Members shall serve without pay and their terms of office will be for a period of two years beginning on September 1 of each odd numbered year. The board shall adopt rules and regulations, subject to approval of the city council, to govern its proceedings and deliberations. When a vacancy occurs on the board, the city council shall appoint a new member to fill the vacancy for the unexpired term. Six members shall constitute a quorum and issues shall be decided by a simple majority of those present.

(b) Members of the board must be residents of the city, and shall be chosen as far as practicable in a manner that will represent the entire community. Members should be educated or experienced in one or more of the following fields: art, drama, law, literature, philosophy, sociology, psychology, history, education, music, science, or other fields. At least four members must be qualified to interpret and write the Spanish language, (Ord. Nos. 12169; 12373; 14552; 14730; 14862; 14930; 14952)

SEC. 46-15. CLASSIFICATION PROCEDURE.

(a) Within a reasonable time before initial exhibition, a distributor shall file an application which contains the following information concerning a film:

(1) Proposed classification, either "Suitable for Young Persons" or "Not Suitable for Young Persons".

(2) Title of film and date of initial exhibition.

(3) Summary of plot and names of the primary actors.

(b) If a "Not Suitable for Young Persons" classification is proposed by a distributor, the board shall accept the classification by formal board action or failure to act within seven days after the application is filed. If a "Suitable for Young Persons" classification is proposed by a distributor, the board shall:

(1) accept the classification by:

(A) formal board action; or

(B) failure to act within seven days after an application is filed unless the board directs additional information filed;

(2) direct a distributor to file additional information on a film and when the information is filed, accept the classification by:

(A) formal board action; or

(B) failure to act within seven days after the additional information is filed unless the board orders projection of a film;

(3) order a distributor to project a film before the board and accept the classification by:

(A) formal board action; or

(B) failure to act within two days after viewing a film or failure to meet after a screening is scheduled; or

(4) reject the classification and determine a classification by formal board action within two days after viewing a film.

(c) A distributor shall provide a suitably equipped screening room for the board to view a film at reasonable hours and may present additional information in support of a proposed classification.

(d) If the board files a "Not Suitable for Young Persons" classification order and the proposed classification had been "Suitable for Young Persons", the order shall contain the following information:

(1) Classification.

(2) Basis for classification under this article.

(3) Any other information the board considers useful to a distributor.

(e) If the board files a "Suitable for Young Persons" classification order, the board may attach one or more of the following symbols to indicate exceptions to the order and to advise parents of young persons that a film contains certain material:

(1) 'L' means obscene language or language used to describe sexual conduct, defecation, urination, or genitalia.

(2) "S" means sexual conduct or implicit sexual conduct or defecation or urination.

(3) "V" means infliction of serious bodily injury to a person or animal, or infliction of serious damage to or destruction of property.

(4) "D" means use of harmful drugs or drug abuse.

(5) "N" means nudity.

(6) "P" means a perverse person such as a masochist, sadist, pederast, or other aberrant sexual person.

The attachment of an exception to an order is for public information only and is not subject to judicial review under Section 46-16 of this article.

(f) If the board files a classification order without viewing a film and subsequent investigation reveals a possible erroneous classification, the board may order projection of the film under this section. In the event a film is reclassified, the interested party shall alter his advertising accordingly within two days after the reclassification and comply immediately with the audience provisions of this article. After one year from an original classification order unless the time limit is waived by the board, a distributor may file an application for reclassification in which case the procedures in this section apply.

(g) When the board files a classification order or any other order under this article, the director of consumer affairs shall give notice of the order by mail to the distributor and any other interested party who requests the notice.

(h) No young person may attend a screening of a film while the board is viewing the film for the purpose of classification under this article. (Ord. Nos. 12169; 13271; 13525; 13548; 14730; 14862; 14930; 15365; 15511; 16295; 17517)

SEC. 46-16. JUDICIAL REVIEW.

(a) Within two days after the board files a classification order under Section 46-15(d) of this article, an interested party may file notice of nonacceptance of the classification. Within three days after notice of nonacceptance is filed, the board shall initiate suit in district court for determination that a film is "Not Suitable for Young Persons" and for an injunction to prohibit the exhibition of the film in violation of this article. The board shall bear the burden of showing that the film is "Not Suitable for Young Persons" and shall proceed with all diligence and expedition in the adjudication of the case.

(b) When a notice of nonacceptance is filed by an interested party, this action constitutes nonacceptance by both the distributor and exhibitor. (Ord. Nos. 12169; 14930; 15365)

SEC. 46-17. CERTAIN ACTS DECLARED PUBLIC NUISANCES.

The following acts are declared to be public nuisances under this article:

(1) A violation of Section 46-18(a) of this article.

(2) Violation of Section 46-18(c)(1) or (2) of this article by an exhibitor, if he or his employee is convicted three times within a two-year period.

(3) Exhibition of a film classified "Not Suitable for Young Persons" at which more than three young persons are in attendance. (Ord. Nos. 12169; 14930)

SEC. 46-18. UNLAWFUL ACTS.

(a) An exhibitor or employee of an exhibitor commits an offense, without regard to his mental state, if he:

(1) exhibits a film which has not been classified by the board:

(2) exhibits a film contrary to a classification order;

(3) fails to post conspicuously in a ticket booth of a theater the classification order; or

(4) exhibits in a theater to a young person a filmed advertisement of a film which has not been classified or is classified "Not Suitable for Young Persons."

(b) A young person commits an offense, without regard to his mental state, if he:

(1) represents falsely he is 16 years of age or older for the purpose of viewing a film classified "Not Suitable for Young Persons"

(2) represents falsely that a person is his parent or legal guardian for the purpose of viewing a film classified "Not Suitable for Young Persons", or

(3) views a film classified "Not Suitable for Young Persons" if a sign is posted conspicuously in a ticket booth of a theater indicating a "Not Suitable for Young Persons" classification.

(c) A person commits an offense if he recklessly:

(1) sells or gives to a young person a ticket to a film classified "Not Suitable for Young Persons";

(2) allows a young person to view a film classified "Not Suitable for Young Persons";

(3) makes a false statement for the purpose of enabling a young person to view a film classified "Not Suitable for Young Persons"; or

(4) allows a young person to attend a screening of a film while the board is viewing the film for the purpose of classification under this article.

(d) A film distributor or employee of a distributor commits an offense, without regard to his mental state, if he fails to have a film classified by the board and the film is exhibited to the public.

(e) Upon failure of a distributor to obtain a classification order for a film, an exhibitor of the film may notify in writing the director of consumer affairs of his intent to exhibit and advertize the film as "Not Suitable for Young Persons" until a classification order is obtained. After notification, the exhibitor shall treat the film as if it were "Not Suitable for Young Persons" and comply with the provisions of this article in that regard.

(f) A film distributor or employee of a distributor commits an offense, without regard to his or her mental

state, if he or she prohibits any person who is sixteen years of age or over from attending the screening of a film at the time the board is viewing the film. It is a defense to prosecution under this subsection (f) if a film distributor or an employee of a distributor prohibits a person from attending a screening in order to comply with Chapter 16 of this code. (Ord. Nos. 12169; 14930; 15145; 15365; 16133; 17028)

SEC. 46-19. DEFENSE.

(a) It is a defense to prosecution under Sections 46-17(3), 46-18(a)(4), 46-18(b)(3), 46-18(c)(1) or 46-18(c)(2) of this article that the young person was accompanied by his parent or legal guardian during exhibition of the film.

(b) It is a defense to prosecution under Section 46-18(a)(2), 46-18(a)(3), 46-18(a)(4), 46-18(b)(3), 46-18(c)(1), 46-18(c)(2), and 46-20(a)(2)(A) of this article that a notice of nonacceptance has been filed and no temporary or permanent injunction has been granted pursuant to the provisions of Section 46-16. (Ord. Nos. 12169; 13525; 13548; 14930; 16133; 17517)

SEC. 46-20. ADVERTISEMENT.

(a) A film distributor, exhibitor, or an employee of a film distributor or exhibitor commits an offense, without regard to his mental state, if he:

(1) places or causes to be placed an advertisement for a film which has not been classified by the board;

(2) places or causes to be placed an advertisement which:

(A) fails to display or displays incorrectly the classification order of the board; or

(B) describes as "Suitable" a film classified by the board as "Not Suitable for Young Persons", regardless of whether a notice of nonacceptance has been filed and regardless of whether a temporary or permanent injunction has been granted pursuant to the provisions of Section 46.16; or

(3) places or causes to be placed an advertisement which fails to comply with the following requirements:

(A) Minimum type size of six points for a classification order if the advertisement is at least two columns in width and two inches in height.

(B) Minimum type size of five points for a classification order if the advertisement is less than two columns in width and two inches in height and Section 46-20(a)(3)(C) does not apply.

(C) A point size and style for a classification order which is the same as the show time if the advertisement is three-fourths an inch or less in height.

(D) Type style and face for a classification order which is legible and readable.

(E) Location for a classification order which is near the Motion Picture Association of America rating, if a rating appears.

(b) In an advertisement, the wording of a classification order is:

(1) "Not Suitable", if the order is "Not Suitable for Young Persons";

(2) "Suitable Except (S)(V)(L)(D)(N)(P)", whichever symbol applies if the order is "Suitable for Young Persons" with Exceptions; or

(3) "Suitable", if the order is "Suitable for Young Persons".

(c) It is a defense to prosecution under Subsection (a) of this section that the advertisement appeared only before the day of initial exhibition.

(d) It is a defense to prosecution under Subsection (a)(2) of this section that the actor was unable to correct the advertisement immediately, but the correction was made within a reasonable time after the classification order was issued.

(e) If a theater primarily exhibits Spanish language films or a newspaper primarily publishes in the Spanish language, the display or advertisement of a classification order which is required under this chapter must appear in the Spanish language. (Ord. Nos. 15145; 15365; 17517)

Supreme Court, U.S.
FILED
MAY 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

(A)

No. 88-49

In The
Supreme Court of the United States
October Term, 1988

____ O ____
CALVIN BERRY, III, et. al.,

Petitioner

vs.

THE CITY OF DALLAS, et. al.,

Respondent

____ O ____
**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

____ O ____
BRIEF FOR PETITIONER

____ O ____

Frank P. Hernandez
5999 Summerside, Suite 101
Dallas, Texas 75252
(214)931-9444
(Counsel of Record)

28 PP

QUESTIONS PRESENTED

1. WHETHER CITY OF DALLAS ORDINANCE NO. 19196, SECTIONS 41, A-2(4), (A),(B), (C); SECTION 41 A-2(19); SECTION 41 A-3 (1) THROUGH (9); AND SECTION 41 A-18 (a), (b), (c) ARE UNCONSTITUTIONAL AND VIOLATE THE FIRST, FOURTH, FIFTH, AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.
2. WHETHER CITY OF DALLAS ORDINANCE NO. 19196 IS UNCONSTITUTIONAL AS AN INFRINGEMENT ON AN INDIVIDUAL'S RIGHT TO FREEDOM OF ASSOCIATION.

PARTIES

CALVIN BERRY, III, PETITIONER-PLAINTIFF

SANJAY THAKOR, PETITIONER-PLAINTIFF

RUDOLFF FERNANDEZ, PETITIONER-PLAINTIFF

DALLAS MOTEL ASSOCIATION, PETITIONER-PLAINTIFF

CITY OF DALLAS, TEXAS, RESPONDENT-DEFENDANT

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
LIST OF PARTIES.....	ii
TABLE OF CONTENTS.....	iii
LIST OF AUTHORITIES.....	iv
OPINIONS BELOW.....	1
JURISDICTIONAL STATEMENT.....	1
APPLICABLE CONSTITUTIONAL PROVISIONS.....	2
STATEMENT OF THE CASE.....	4
SUMMARY OF ARGUMENT.....	7
ARGUMENT.....	8
CONCLUSION.....	19

LIST OF AUTHORITIES

CASES	Page
Baker vs. Wade, 769 F.2d 289 (5th Cir. 1985)(<i>en banc</i>), <i>Cert. Denied</i> , __U.S.__, 106S.Ct. 3338, 92 L.Ed. 2d 742 (1986).	5
Bowers vs. Hardwick, __U.S.__, 106 S.Ct. 2841, 92 L.Ed. 2d 140 (1986).	5, 17
California v. Ciraolo, __U.S.__, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).	16
Carey vs. Brown, 447 U.S. 455, 100 S.Ct. 2286 65 L.Ed.2d(1980).	12
Carey vs. Population Services International, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977).	18
City of Cleburne vs. Cleburne Living Center __U.S.__ 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).	17
City of Renton vs. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d.29 (1986).	8, 9
Clark vs. Community for Creative Non-Violence, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed. 2d 221 (1984).	12
Consolidated Edison Co. vs. Public Service Comm'n of N.Y., 447 U.S. 530, 110 S.Ct.2326, 65 L.Ed.2d 319 (1980).	8, 10
Data Processing Service vs. Camp., 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed. 2d 184 (1970)	15
Dumas vs. City of Dallas, 648 F. Supp. 1061, (N.D. Tex. 1986).	1, 5
Eisenstadt vs. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L. Ed.2d 349 (1972).	18
Erznoznik vs. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed. 2d 125 (1975).	11

CASES	Page
FW/PBS, Inc. vs. City of Dallas, 837 F.2d 1298 (5th Cir. 1988).....	1, 4, 5, 6, 7
Griswold vs. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)	18
Heffron vs. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).	12
Katz vs. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d. 576 (1967).	14, 15
Loving vs. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).	18
Northend Cinema, Inc. vs Seattle, 90 Wash., 2d 709, 585 P.2d 1153, (1978) <i>cert. denied</i> , <i>sub. nom.</i> Apple Theatre, Inc. vs. Seattle, 441 U.S. 946, 99 S.Ct. 2166, 60 L.Ed.2d 1048 (1979).	13
O'Connor vs. Donaldson; 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975).	17
Olmstead vs. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928).	14, 16
Paris Adult Theatre I. vs. Slayton, 413 U.S. 66, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973)	17, 18
Patel and Patel vs. South San Francisco, 606 F. Supp. 661, (N.D. Cal 1985)	5
Payton vs. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).	15
Pierce vs. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).	15
Police Department of Chicago vs. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed. 2d 212 (1972).	11

CASES	Page
Rios vs. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960)	15
Roberts vs. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).	13
Roe vs. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).	15
Shad vs. Borough of Mount Ephraim, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed. 2d 671 (1981).	11
Stanley vs. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).	14, 16
Terminiello vs. Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L. Ed. 1131 (1949).	11
Thornburgh vs. American Coll. of Obst. & Gyn., __U.S.__, 106 S.Ct. 2169, 90 L.Ed.2d __ (1986)	14
U.S. Dept. of Agriculture vs. Moreno, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973).	17
United States vs. Karo, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984).	15
United States vs. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)	8
Young vs. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2240, 49 L.Ed.310(1976).	10, 12

vii
OTHER AUTHORITY

	Page
United States	
U.S. Const., Amend I.	2
U.S. Const., Amend IV	2
U.S. Const., Amend V	2
U.S. Const., Amend XIV	2
City of Dallas Ordinances	
Section 41A-2.	2
Section 41A-3.	2
Section 41A-7.	3
Section 41-18.	3

TREATISES

Immorality and Treason, H.L.A. Hart	17
reprinted in The Law as Literature 220, 225	
(L. Blom-Cooper ed. 1961).	

No. 88-49

_____ O _____

In The
Supreme Court of the United States
October Term, 1988

_____ O _____

CALVIN BERRY, III, et.al.,

Petitioner

vs.

THE CITY OF DALLAS, et.al.,

Respondent

_____ O _____

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

_____ O _____

BRIEF FOR THE PETITIONER

_____ O _____

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Fifth Circuit was issued on February 12, 1988 affirming the judgment of the District Court. *FW/PBS, Inc., vs. City of Dallas*, 837 F.2d. 1298 (5th. Cir. 1988). The judgment of the District Court was issued on September 12, 1986 granting Respondent's Motion For Summary Judgment. *Dumas vs. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986). The Petition for a Writ of Certiorari was filed on June 13, 1988. The petition was granted on February 27, 1989.

JURISDICTIONAL STATEMENT

The judgment of the the United States Court of Appeals for the Fifth Circuit was entered on February 12, 1988. The jursidiction of this Court is in-

voked under 28 U.S.C. Sec. 1254 (1), and 28 U.S.C. Sec. 2101 (c), and under 28 U.S.C. 2103.

APPLICABLE CONSTITUTIONAL PROVISIONS.

UNITED STATES CONSTITUTION, Amendment I

Congress shall make no law...abridging the freedom of speech,...or the right of the people peaceably to assemble....¹

UNITED STATES CONSTITUTION, Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,....

UNITED STATES CONSTITUTION, Amendment V.

No person shall...be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, Amendment XIV.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

DALLAS REVISED MUNICIPAL CODE, Chap. 41 *et. seq.*, enacted June 18, 1986 together with amendments to chapter 41 enacted on October 12, 1986. Specifically,

SECTION 41, A-2. Definitions.

(4) ADULT MOTEL means a hotel, motel or similar commercial establishment which:

(A) offers accommodations to the public for any form of consideration; provides patrons with closed circuit television transmissions,

¹ The State of Texas has similar provision. Texas Constitution, Article 1 • 8, Freedom of speech and press, provides that "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press."

films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; and has a sign visible from the public right of way which advertises the availability of this adult type of photographic reproductions; or

(B) offers a sleeping room for rent for a period of time that is less than 10 hours; or

(C) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than 10 hours.

(19) SEXUALLY ORIENTED BUSINESS means ..an adult motel....

SECTION 41A-3 CLASSIFICATION.

Sexually oriented businesses are classified as follows:

(4) adult motels;

SECTION 41A-18 ADDITIONAL REGULATIONS FOR ADULT MOTELS

(a) Evidence that a sleeping room in a hotel, motel, or similar commercial establishment has been rented and vacated two or more times in a period of time that is less than 10 hours creates a rebuttable presumption that the establishment is an adult motel as that term is defined in this chapter.

(b) A person commits an offense if, as the person in control of a sleeping room in a hotel, motel, or similar commercial establishment that does not have a sexually oriented business license, he rents or subrents a sleeping room to a person and, within 10 hours from the time the room is rented, he rents or subrents the same sleeping room again.

(c) For purposes of Subsection (b) of this section, the terms "rent" or "subrent" mean the act of permitting a room to be occupied for any form of consideration.

SECTION 41A-7 INSPECTION

(c) The provisions of this section do not apply to areas of an adult motel which are currently being rented by a customer for use as a

permanent or temporary habitation.

STATEMENT OF CASE

Petitioners are owners and operators of motels located in the City of Dallas, Texas. Petitioners rent their motel rooms out to the general public for various periods of time, the shortest time being two hours. Petitioners provide patrons with television transmissions, public circuit television transmission and video cassettes. Petitioners' motels do not have a sign visible from the public right-of-way which advertises the availability of this photographic reproduction. Petitioners rent motel rooms to individuals: individuals of the same sex, individuals of the opposite sex, individuals who are married, individuals who married with families, individuals who are unmarried, individuals who are unmarried with families. In short, Petitioners rent motel rooms to the general public in a competitive free market atmosphere, charging competitive market prices for the use of their facilities.

On June 18, 1986, the City of Dallas, Texas, acting through its City Council, amended the Dallas City Code, Chapter 41 by enacting Ordinance 19196. Chapter 41A is defined as Sexually Oriented Businesses.

Petitioners filed their Original Complaint as a civil action in the Northern District of Texas seeking a Temporary Restraining Order and a Permanent Injunction against the City of Dallas, requesting that the City of Dallas be enjoined from enforcing the provisions of Ordinance 19196.

Petitioners challenged Ordinance 19196 as being unconstitutional and violative of the First, Fourth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution. Petitioners challenged Ordinance 19196 as being violative of the Equal Protection Clause of the United States Constitution.

Since, *FW/PBS, Inc., et. al. vs. the City of Dallas, Texas, et. al.*, had been filed prior to Petitioners filing their Original Complaint, the Court, by Order on August 4, 1986, consolidated all of the challenges to City of Dallas Ordinance 19196 and, by Order of August 6, 1986, set an accelerated schedule for oral argument on all Motions For Summary Judgment For Oral Presentation in September and, on September 12, 1986, the District Court filed its Memorandum Opinion granting Respondent's Motion For Summary Judgment.

Respondents appealed to the Fifth Circuit Court of Appeals and that portion relating to adult motels was affirmed. *FW/PBS, Inc., et. al. vs. the City of Dallas, Texas, et. al.*, 837F.2d 1298 (5th Cir. 1988).

It is Petitioners' position that neither the District Court nor the United States Court of Appeals for the Fifth Circuit has addressed the adult motel issue meaningfully. The District Court referred to the adult motel issue only in the following instances:

FW/PBS, Inc., et. al. vs. the City of Dallas, Texas, et. al., where the Court stated:

Five members of the 15-member Commission and four of the 11 members of the council stated unequivocally—to no dissent—that the Ordinance was concerned solely with controlling the secondary effects of sexually-oriented businesses on surrounding neighborhoods. (Footnotes omitted)

Dumas vs. City of Dallas, 648 F.Supp. 1061, 1066-67 (N.D. Tex.1986), where the Court stated:

The plaintiffs in this case operate seven of the nine types of sexually oriented businesses classified in the ordinance: (1) adult arcades; (2) adult bookstores or adult video stores; (3) adult cabarets; (4) adult motels; (5) adult motion picture theaters; (6) adult theaters; and (7) nude model studios. There are no escort agencies or sexual encounter centers that have appeared to challenge the ordinance. (Footnote omitted, emphasis added)

Adult motels, for example, will be restricted to renting rooms for at least 10 hours rather than the two-hour period, now—thus cutting income by up to 80 percent

Dumas vs. City of Dallas, 648 F.Supp. 1061, 1076 (N.D. Tex.1986), where the Court stated:

The City did indeed make sufficient findings to justify restrictions on adult motels, see ante at 4 n. 9 (statement of Ms. Ragsdale), compare *df.*, *Patel and Patel vs. South San Francisco*, 606 F. Supp. 661, 671 (N.D. Cal 1985)(no findings); moreover, recent pronouncements of state power to regulate morality and private consensual activity are probably broad enough to encompass regulations on adult motels. See *Bowers v. Hardwick*, __U.S.__, 106 S.Ct.2841, 92L.Ed. 2d 140 (1986) (no privacy right to consensual homosexual, and, heterosexual sodomy); *Baker vs. Wade*, 769 F.2d 289 (5th Cir. 1985)(en banc), *Cert.*

Denied, __U.S.__, 106 S.Ct. 3338, 92L.Ed.2d 742 (1986)
(Footnote omitted.)

The United States Court of Appeals for the Fifth Circuit had one paragraph that relates to Petitioners, when it stated in *FW/PBS, Inc., vs. City of Dallas*, 837 F.2d 1298, 1304 (5th Cir. 1988) as follows:

(4) The owners of adult motels make a separate challenge to the Ordinance provision prohibiting rental of a motel room for less than ten hours at a time. The motel owners allege that the City made no finding that adult motels engender the same effects on property values and crime as do other sexually oriented businesses. Once again, however, we find the City's interest to be self-evident and substantial. It is certainly within reason that short rental periods facilitate prostitution, one of the criminal effects with which the City Council was most concerned.

These are the only references to adult motels by the District Court and the Fifth Circuit Court of Appeals.

The "sufficient findings to justify the restrictions on adult motels" cited by the District Court are contained in Respondent's Exhibit 17 (Defendant's Exhibit DX17), which was a Dallas City Council meeting on June 18, 1986. The only finding, testimony, or any reference to adult motels was by City Councilwoman Ms. Ragsdale, who stated, in part, as follows:

This ordinance, particularly with respect to the motels and the proliferation of motels in the southern sector and which are in close proximity to churches, residences, as well as schools, continue to not only increase the crime but also just the neighborhood is becoming viciously angry at the presence and the ongoing presence of these given—of these given facilities within the area....It will do the following for those who have come to speak regarding the motels and most of those individuals who did come down regarding Cedar—regarding the motel on Mouser and Cedar Crest happened to be in the district that I represent. It will do the following: Number one, motels—motel rooms would not lease or rent for less than twelve hours. Number two, if motels are in close proximity, meaning a thousand feet within a residence or within church, within school, then over a three-year period these motels should be phased out. If they are caught—during the interim, if they are caught violating the law, of course,

then their license can be revoked.²

This statement by Councilwoman Ragsdale is the only direct evidence as to the effect of adult motels in Dallas, Texas. Respondents introduced at the trial a "Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles" (Defendants' Exhibit DX11), which Respondents claim the Dallas City Council considered prior to enacting the Ordinance (Respondents' Brief In Opposition, Pg. 4). However, a reading of the Los Angeles City Planning Department Study of June, 1977, clearly demonstrates that, although the study mentions motels, it makes no attempt to explore the subject of "adult motels" meaningfully nor in depth.

On February 12, 1988, the Fifth Circuit affirmed the District Court's Opinion. *FW/PBS, Inc., et.al. vs. the City of Dallas, Texas, et.al.*, 837 F.2d.1298 (5th Cir. 1988). On June 13, 1988 Petitioners filed their Petition For Certiorari in this case and it was granted on February 27, 1989, bringing the case before the Court.

SUMMARY OF ARGUMENT

The central issue in this case is whether a city may regulate a business on the basis that a city's interest is self-evident and substantial. The answer is no.

There were no findings by the City of Dallas which identified the adverse impact that renting a motel room for less than ten hours has on a community. The requirements of the case of *City of Renton* have not been met and a ten year old study by the City of Los Angeles is not credible supporting evidence for the Ordinance.

The City of Dallas made no specific findings of the impact by the motel owners' actions on health, safety, welfare, unlawful sexual activities, sexual liaisons of a casual nature or sexually transmitted diseases.

The State power to regulate morality does not extend to the regulation of adult motels.

The record in this case is insufficient to meet the *O'Brien* and *City of Renton* tests. The Ordinance discriminates on its face against speech-based content. The Ordinance is not precisely drawn to pass constitutional muster.

² Appendix C, Petitioner's Petition For Writ Of Certiorari filed June 13, 1988

Even if the Ordinance is treated as a content-neutral time, place and manner restriction, it is still unconstitutional. The First Amendment guarantees are applicable to the Ordinance because the actions of Petitioners and their clientele are protected under the "intimate association" and "expressive association" constitutional protections.

The real party in interest is the City of Dallas. The right of privacy as set forth by this Court in previous cases mandates that the Ordinance be declared unconstitutional. The Ordinance is not a morally-neutral exercise of the City's power to protect the public environment. It is a law designed to enforce private morality and such interference makes the Ordinance unconstitutional.

ARGUMENT

The central issue in this case, as it pertains to the motel owners and operators, is whether a city may regulate a business on the basis that the city's interest is self-evident and substantial.

The Ordinance focuses on the secondary effects of sexually oriented businesses, and there is no doubt that its terms have an incidental impact on expression as protected by the First Amendment. With regard to motels, the Ordinance focuses on the secondary effects of the motel rental practice of renting a motel room for a period as short as two hours. Because of its First Amendment impact, the Ordinance must be analyzed under the four part test of *United States vs. O'Brien*, 391 U.S.367, 377, 88 S.Ct. 1673, 1679, 20 L.ed. 2d. 672 (1968). Under *O'Brien*, regulation is justified, regardless of its impact on First Amendment interests, "[1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on...First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S.377, 88 S.Ct. at 1679. Incidental burden on free expression may be analyzed under this test as time, place, and manner regulations. *City of Renton, vs. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct.925, 89 L.Ed.2d.29 (1986). However, "[A] constitutionally permissible time, place or manner restriction may not be based upon either the content or subject matter of speech." *Consolidated Edison Co. vs. Public Service Comm'n of N.Y.*, 447 U.S. 530, 536, 110 S.Ct. 2326, 2332, 65 L.Ed.2d 319 (1980).

NO FINDINGS BY THE CITY THAT LESS THAN TEN HOUR RENTAL PERIOD HAS ANY ADVERSE IMPACT

The Ordinance enacted by the City incorporated the finding that it had authority to regulate businesses pursuant to its police power and that licensing

was a reasonable means to ensure that subject businesses complied with the regulations. See Ordinance (Defendants' Exhibit DX16) at 2. The council found that a substantial number of sexually oriented businesses require regulations to protect the health, safety and welfare of the establishments' patrons and of citizens in general. The City further found that safety authorities should regulate such businesses because the businesses "are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature" and because of the "concern over sexually transmitted disease." See Ordinance (Defendants' Exhibit DX 16) at 2. The council found that arrests for sex-related crimes near sexually oriented businesses had been substantial and that there was convincing evidence that sexually oriented businesses were associated with falling property values of surrounding business and residential areas. Additionally, the council found that when such businesses are located near one another, urban blight and a decrease in the quality of life results. Finally, the council stated that its intent was to minimize these adverse effects, thus preserving property values in surrounding neighborhoods, deterring the spread of urban blight, and decreasing crime. See Ordinance (Defendants' Exhibit DX16) at 5.

This Court has held that a city does not have to conduct its own studies before enacting an Ordinance, stating:

The First Amendment does not require a city, before enacting such an Ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies on is reasonably believed to be relevant to the problem that the city addressess. *City of Renton vs. Playtime Theatres, Inc.*, 475 U.S.41, 106 S.Ct. 425, 89 L.Ed.2d,40 (1986).

Petitioners contend that the City did not meet this burden when it relied on a ten-year old study by the Los Angeles City Planning Department conducted in June, 1977, a study that did not specifically explore the impact of adult motels as this may relate to the purposes and intent of the Dallas Ordinance. The only other evidence is the statement by Councilwoman Ragsdale. See Ordinance (Defendants' Exhibit DX17). Petitioners contend that this evidence falls short of meeting the requirement that the City rely on relevant evidence prior to enacting such an Ordinance.

Specifically, there was no finding by the City that renting motels for less than ten hours had any impact on the health, safety and welfare of the establishments' patrons and citizens in general.

Specifically, there was no finding that the renting of a motel room for less than ten hours contributed to the use of the motel room for unlawful sexual activities, including prostitution.

Specifically, there were no findings that the rental of the motel room for less than ten hours had any adverse impact on the health, safety and welfare of the establishments' patrons and citizens in general or contributed to "sexual liaisons" of a casual nature.

Specifically, there were no findings by the City that the rental of a motel room for less than ten hours had contributed to the spread of sexually transmitted disease.

Since the Ordinance does not regulate consensual activity once customers have rented the room, its regulation of the length of time for which a motel room may be rented is at best irrelevant to the City's expressed concern over sexually transmitted disease and of sexual liaisons of a casual nature.

The Ordinance does not prohibit motels from renting a room by the hour. See Ordinance 41A-18(B). It defines those motels which rent rooms for increments of less than ten hours as "adult motels" and declares that a person commits an "offense" if that person does not have a license to operate a sexually oriented business and rents or subrents a motel room from within ten hours from the time the room is rented, he rents or subrents the same room again. This provision makes the defined "adult motel" then subject to the same type of locational restrictions as those contained in *Young vs. American Mini Theatres, Inc. and City of Renton*. Although the City found that these motels required regulation to protect the health, safety and welfare of the establishments' patrons and the general citizenry, this time, place or manner restriction is simply based on a perception of content or activities that occur in the motel rooms rather than on tangible evidence; thus it violates the Constitution. *Consolidated Edison Co. vs. Public Service Comm'n of N.Y.*, 447 U.S., 530, 536, 100 S.Ct. 2326, 2332, 65 L.Ed.2d.319(1980).

DOES STATE POWER TO REGULATE MORALITY EXTEND TO ENCOMPASS REGULATION OF ADULT MOTELS

The District Court relied on *Bowers vs. Hardwick* and *Baker vs. Wade* to conclude that

"...recent pronouncements of state power to regulate morality and private consensual sexual activity are probably broad enough to encompass regulation of adult motels."

The Fifth Circuit, realizing that the record was not sufficient to meet the *O'Brien* and *City of Renton* tests found:

"...the City's interests to be self-evident and substantial."

In fact, without support from the record, the Fifth Circuit concluded that:

"It is certainly within reason that short rental periods facilitate prostitution, one of the criminal effects with which the city council was most concerned."

With regard to adult motels, the Ordinance discriminates on its face against certain forms of speech-based content. Motels which rent rooms for less than ten-hour increments are classified and defined as adult motels and may not be located within 1000 feet of any residential zone, single or multiple family dwellings, church, park, or school. Other hotels and motels that do not rent rooms for less than ten hours are not classified and defined as adult motels. This selective treatment strongly suggests that the City of Dallas was interested not in controlling the "secondary effects" associated with adult motels, but in discriminating against adult motels solely on the *perceptions* of what occurs in a given motel room within a two-hour period. In this regard, the Statute is infirm because:

"[A]bove all else, the First Amendment means the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Police Department of Chicago vs. Mosley*, 408 U.S. 92, 95; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215, 95 S.Ct. 2268, 2275, 45 L.Ed.2d 125 (1975)."

That some residents may be offended by what occurs in motel rooms, whether they be rented for a period of two hours, ten hours, or longer periods, cannot form the basis for State regulation of speech. See *Terminiello vs. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949). Some of the findings by the City Council clearly relate to the secondary effects associated with what are described as sexually oriented businesses. They do not relate to supposed secondary effects "associated with adult motels." Nevertheless, this Court should not merely accept these statements at face value. "[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment." *Shad vs. Mount Ephraim*, 452 U.S. 61, 77, 101 S.Ct. 2176, 2187, 68 L.Ed.2d 671 (1981) (BLACKMUN, J., concurring). The City Council conducted no studies and heard no expert testimony on how the protected uses would be affected by the presence of adult motels, and never considered whether residents' concerns could be met by "restrictions that are less intrusive on protected forms of expression." *Schad, supra*, 452 U.S., at

74, 101 S.Ct. at 2186. As a result, any "findings" regarding "secondary effects" caused by adult motels or the need to adopt specific locational requirements to combat such effects, were not "findings" at all, but purely speculative conclusions. Such "findings" were not such as are required to justify the burdens the Ordinance imposes upon constitutionally protected expression.

This Court requires that the Ordinance, like any other content-based restriction on free expression, is constitutional "only if [the City] can show that [it] is a precisely drawn means of serving a compelling [governmental] interest." *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S., at 540, 100 S.Ct., at 2334; see also *Carey vs. Brown*, 447 U.S. 455, 461-462, 100 S.Ct. 2286, 2290-2291, 65 L.Ed.2d 263 (1980); *Police Department of Chicago vs. Mosley*, 408 U.S. 92, 99, 92 S. Ct. 2286, 2292, 33 L.Ed.2d 212 (1972). Only this strict approach can ensure that cities will not use their zoning powers as a pretext for suppressing constitutionally protected expression. The City of Dallas has not shown that locating adult motels in proximity to its churches, schools, parks, and residences will result in undesirable "secondary effects" or that these problems could not be effectively addressed by less intrusive restrictions.

Even assuming that the Ordinance should be treated as a content-neutral time, place, and manner restriction, as the District Court assumed, the Ordinance is still unconstitutional. "[R]estrictions of this kind are valid provided...that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark vs. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984); *Heffron vs. International Society for Krishna Consciousness, Inc.* 452 U.S. 640, 648, 101 S.Ct. 2559, 2564 69 L.Ed.2d 298 (1981). In applying this standard, this Court must subject the alleged interests of the City to the degree of scrutiny required to ensure that expressive activity protected by the First Amendment remains free of unnecessary limitations. See *Community for Creative Non-Violence*, 468 U.S., at 301, 104 S.Ct. at 3073 (MARSHALL, J., dissenting).

The District Court and the Appellate Court found that the Ordinance was designed to further City of Dallas' substantial interests in preserving the quality of urban life; or conversely, in diminishing urban blight. As it relates to the described adult motels, the record here is simply insufficient to support this conclusion. The City made no showing as to how uses protected by the Ordinance would be affected by the presence of adult motels. Therefore, this City of Dallas Ordinance, as it affects adult motels, is clearly distinguishable from the Detroit Zoning Ordinance upheld in *Young vs. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). The Detroit Ordinance, which was designed to disperse adult theaters throughout the city, was sup-

ported by the testimony of urban planners and real estate experts regarding the adverse effects of locating several such businesses in the same neighborhood *Id.* at 55, 96 S.Ct., at 2445; See also *Northend Cinema, Inc., vs. Seattle*, 90 Wash.2d 709, 711, 585 P.2d 1153, 1154-1155 (1978), cert. denied, *sub. nom. Apple Theatre, Inc. v. Seattle*, 441 U.S. 946, 99 S.Ct. 2166, 60 L.Ed.2d 1048 (1979). The Seattle zoning ordinance was the "culmination of a long period of study and discussion." Here, as has been substantiated above, the Dallas City Council was aware only that some residents had complained about adult motels, and that a ten-year old study by the City of Los Angeles had considered cursorily the effect of adult motels. These are not "facts" sufficient to justify the burdens the Ordinance imposes upon constitutionally protected expression of the motel owners and operators and their clientele.

THE RIGHT TO BE LET ALONE

While the First Amendment does not explicitly protect "a right of association," this Court has recognized that it embraces such a right in certain circumstances. In *Roberts vs. United States Jaycees*, 468 U.S. 609, 104 S.Ct. 3244 82 L.Ed.2d 462 (1984), this Court noted two different sorts of "freedom of association" that are protected by the United States Constitution. "Our decisions have referred to constitutionally protected 'freedom of association' in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, the freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized the right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.*, at 617-618, 104 S.Ct., at 3249.

It is clear that motel patrons are engaged in the sort of intimate human relationships referred to in *Roberts vs. United States Jaycees*, *supra*. This Ordinance limits the motel owner's ability to rent his motel room for a period of less than ten hours and it limits the opportunity of adults to rent a motel room for as short a time of time as two hours. Although there is scant evidence in the record as to what activities occur in Petitioner's motel rooms, it clearly can be determined that activities protected by the First Amendment are being restricted by the Ordinance because the Petitioner's motel rooms have, at the very least, public access television transmissions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas." Petitioners do not concede that any of the activities that occur in their motel rooms are unlawful. Petitioners do contend that the associational "activities" of their patrons do involve

the sort of expressive association that the First Amendment has been held to protect. The activity of the motel owners qualifies as a form of "intimate association" and as a form of "expressive association" as those terms were described in *Roberts vs. United States Jaycees*, *supra*.³ The City of Dallas concedes that the Ordinance "does not regulate consensual activity within motels." (Respondents' Brief In Opposition, pg. 5) and that the Ordinance "does not prohibit motels from renting rooms by the hour." (Respondents' Brief In Opposition, pg. 6).

This case is no more about regulating adult motels as sexually oriented businesses than *Stanley vs. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), was about a fundamental right to watch obscene movies or *Katz vs. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d, 576 (1967) was about a fundamental right to place interstate bets on the telephone. Rather, this case is about "the most comprehensive of rights and the right most valued by the civilized men": namely, "the right to be let alone." *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (BRANDEIS, J., dissenting). The Ordinance at issue attempts to prevent a commercial business from exercising its admitted First Amendment rights. The Respondent concedes that the Ordinance does not regulate once the patron is in the motel room, but attempts to classify the motel owner as an "adult motel" owner, thereby stigmatizing the motel and its activities and unnecessarily restricting its location and requiring it to comply with all of the other licensing requirements of the Ordinance.

The Ordinance and the Respondent's claims must be analyzed in light of the values that underlie the constitutional right to privacy of the motel owners, and the commercial free speech aspects of the Ordinance as applied to the motel owners and operators.

If the right to be let alone means anything, it means that before the City of Dallas can prosecute its citizens who own motels because other citizens who make choices about the most intimate aspects of their lives, choose to do so in Petitioner's motel rooms, it must do more than assert that the choice they have made is based upon an arbitrary length of time that one citizen has chosen to rent a motel to another citizen.

This Court has long recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. *Thornburgh v. American Coll. of Obst. & Gyn.*, __ U.S. __, 106 S. CT. 2169, 2184, 90 L.Ed.2d __ (1986). In construing the right of privacy, this

³ Since the protective right qualifies as "intimate association" and as "expressive association," the rational-basis scrutiny discussed by the Court in *City of Dallas, et al., vs. Stanglin*, U.S., S.Ct., L.Ed.2d, __ (1989) [decided April 3, 1989, no. 87-1848] is not applicable to the Sexually Oriented business Ordinance. The Court stated:

We think respondent's arguments misapprehend the nature of rational-basis scrutiny, which is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause. In *Dandridge v. Williams*, 397 U.S. 471,

Court has proceeded along two somewhat distinct, albeit, complementary, lines. First, it has recognized a privacy interest with reference to certain decisions that are properly for the individual to make. *Roe vs. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Pierce vs. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). Second, it has recognized a privacy interest with reference to certain places without regard for the particular activities in which the individuals who occupy them are engaged. *United States vs. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984); *Payton vs. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Rios vs. United States*, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960).

The impact of the Ordinance in this case implicates both the *decisional* and the *spatial aspects* of the right to privacy as it reaches not only the motel owner and operator, but the clientele of the establishment.

The real party in interest is the City of Dallas, for it is the facial constitutionality of a City of Dallas Ordinance that is at issue. In public law cases in which statutory or constitutional violations are asserted, the standing for the real party in interest is present when "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing Service vs. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed. 2d 184 (1970)

The behavior for which the motel owners and operators face prosecution occurs within the sphere of their commercial free speech protection and their clientele's temporary home, a place to which the Fourth Amendment attaches special significance. The District Court and the Appellate Court's treatment of the adult motel aspect of the Ordinance is symptomatic of their overall refusal to consider the broad principles that have informed this Court's treatment of privacy in specific cases. The right to privacy is more than the aggregation of a number of entitlements to engage in specific behavior. Protecting the integrity of the temporary home—i.e., the motel room rented for a specific allotment of time—is more than merely a means of protecting specific activities that often take place there. In this case, the Ordinance does not challenge the specific activities that may take place there. Even when the right to privacy depends on "reference to a 'place'," *Katz vs. United States*, 389, U.S. at 361, 88 S.Ct. at 516 (HARLAN, J. concurring),

90 S. Ct. 1153, L.Ed.2d 491 (1970), in rejecting the claim that Maryland welfare legislation violated the Equal Protection Clause, the Court said:

"[A] State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because in practice it results in some inequality." *Lindsey v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 [31 S. Ct. 337, 340, 55 L.Ed. 369 (1911)]. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 [335 Ct. 441, 443, 57 L.Ed. 730 (1913)] "[The rational-basis standard] is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Id.*, in 397 U.S., at 485-486, 90 S.Ct., at 1162.

"the essence of a Fourth Amendment violation is 'not the breaking of [a person's] doors, and the rummaging of his drawers,' but rather is 'the invasion of his indefeasible right of personal security, personal liberty and private property.'" *California v. Ciraolo*, __U.S.__, 106 S.Ct. 1809, 1819, 90 L.Ed.2d 210 (1986) (POWELL, J., dissenting), quoting *Boyd vs. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886).

The motel owners and operators are asserting their right to be let alone. The impact of the Ordinance in this case is similar to the statute struck down in the holding of *Stanley vs. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). *Stanley* held that the State of Georgia's undoubted power to punish the public distribution of constitutionally, unprotected obscene material did not permit the State to punish the private possession of such material. The *Stanley* Court anchored its holding in the Fourth Amendment's special protection for the individual in his home. The *Stanley* Court stated:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.

The Court continued:

These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. *Stanley vs. Georgia*, 394 U.S. 557, at 564-565, 89 S.Ct., 1243, at 1248, quoting *Olmstead vs. United States*, 277 U.S., at 478, 48 S.Ct., at 572 22 L.Ed.2d 542 (BRANDEIS, J. dissenting): (1969).

It is clear that *Stanley* rested as much on the Court's understanding of the Fourth Amendment as it did on the First. Petitioners argue that the Fourth Amendment expressly guarantees the right of the people to be secure in their houses and that such guarantee is the most "textual" of the various constitutional provisions that form our understanding of the right to privacy. Petitioners argue that the right of an individual to conduct intimate relationships in the intimacy of his or her own home, or in his or her own motel room, rented for any length of time, is the center of the Constitution's protection of privacy for its citizens, whether they be clients of motels or motel owners. In fact, the Ordinance does not apply to an area of an adult motel if that area is rented by a client of the motel for use as a permanent habitation (his home) or a temporary habitation (his temporary home). SECTION 41 A-7 (c), (Joint Appendix, page 21).

Petitioners argue that they have the right to be let alone because of their right to commercial free speech as this right affects them directly, and indirectly, as it affects their clientele. It is clear that the Ordinance is attempting to subject motel owners to punishment if they exercise their right to rent their motel rooms for any period less than ten hours. It is equally clear that this punishment is imposed not because of any *evidence* that such rental periods have a harmful effect upon people or property, but because of a purely speculative *perception* of the nature of the purely private activities occurring during the rental periods. There simply are no facts, as that term is generally understood, to support the Ordinance.

It may be argued, although not proved, that the motel owners by renting the motel space for less than ten hours make uncomfortable a certain group, that is, surrounding areas. This Court has held that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty". *O'Connor vs. Donaldson*, 422 U.S. 563, 575, 95 S.Ct. 2486, 2494, 45 L.Ed.2d 396 (1975). See also *City of Cleburne vs. Cleburne Living Center*, ___ U.S. ___, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *U.S. Dept. of Agriculture vs. Moreno*, 413 U.S. 528, 534, 93 S.Ct. 2821, 2825, 37 L.Ed.2d 782 (1973).

The Ordinance here cannot be justified as a morally neutral exercise of the City of Dallas' power to protect the public environment, *Paris Adult Theatre I*, 413 U.S., at 68-69, 93 S.Ct., at 2641. No doubt, some private behavior can affect the fabric of society as a whole. Reasonable people may differ about whether particular acts are moral or immoral, but "we have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty and dishonesty, merely because some private sexual practice which they abominate is not punished by the law." H.L.A. Hart, *Immorality and Treason*, reprinted in *The Law as Literature* 220, 225 (L. Blom-Cooper ed. 1961). The District Court and the Appellate Court failed to see the difference between laws that protect public sensibilities and those that enforce private morality. Furthermore, they did so on even less than a "very thin" basis. *City of Renton*, 748 F.2d., at 536. This Court must remember that a Federal Court of Appeals takes no evidence, creates no record, and decides no factual issues in the first instance. A Federal Court of Appeals is a Review Court.

As Justice Blackmun stated in his Dissenting Opinion in *Bowers vs. Hardwick*, ___ U.S. ___, 106 S.Ct. 2841, 2855 ___ L.Ed. 2d ___, (1986):

"Statutes banning public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations: the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals from unwilling exposure to the sexual activities of others. But the mere fact that intimate behavior may be

punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places." See *Paris Adult Theatre I*, *supra*, at 66 n. 13 ("marital intercourse on a street corner or a theater stage" can be forbidden despite the constitutional protection identified in *Griswold vs. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)).

The Ordinance in this case involves real interference with the rights of the motel owners and the rights of the motels owners' clientele, and the mere knowledge that other individuals in the area allegedly affected by the location of the motel do not adhere to one's own value system cannot be a legally cognizable interest, let alone an interest that can justify invading "the houses, hearts and minds of citizens who choose to live their lives differently." *Id.* __U.S.__ at __, 106 S.Ct. at 2856, __L.Ed.2d (1986). Because the City of Dallas Ordinance expresses the traditional view that what occurs in a motel room is an immoral kind of conduct regardless of the identity of the persons who engage the room and the activity therein, a proper analysis of this constitutionality requires consideration of additional questions: First, may a city totally prohibit the described conduct by means of a neutral law applying without exception to all persons subject to its jurisdiction? Second, may a city save the Ordinance by announcing that it is not regulating consensual activity by adults within motels and is not prohibiting motels from renting rooms by the hour? Third, may the city save the Ordinance by announcing that it is not prohibiting from renting rooms by the hour, but is simply defining those motels which do business as "adult motels" and thereby focusing on the secondary effects of sexual activities that occur between or among private citizens in the motel room?

This Court's prior cases make it abundantly clear that the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice. *Loving vs. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Individual decisions by married persons concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. *Griswold vs. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965). This protection extends to intimate choices by unmarried as well as married persons. *Carey vs. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); *Eisenstadt vs. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L. Ed.2d 349 (1972).

It is not clear from the record that what occurs in the motel room is offensive to the governing majority. Traditionally, motels have been the location of "intimate relationships" by married persons or as unmarried persons, as well as married and unmarried persons of varying ages, races, colors, religious prefer-

ences, and including handicapped individuals. The well-recognized "quickie," the "nooner," the "one night stand" are traditional in America. The only difference between tradition and this Ordinance is that a day rate [over ten hours] or a full rate [at a non-defined adult motel] must be paid at the Petitioner's motels, and their patrons, subject themselves to the requirements of the Ordinance.

Since the Ordinance allows representatives of "the police department, health department, fire department, housing and neighborhood services department, and building inspection division to inspect the premises...at any time it is occupied..." (SECTION 41A-7. Inspection, Joint Appendix, pg. 21) it is not difficult to envision an American tradition eroding away because of the dissolving of a citizen's right to privacy.

This case not only deals with the individual's interest in protection from unwarranted public attention, comment, or exploitation; it deals, rather, with the individual's right to make certain unusually important decisions that will affect him or her individually. Certainly, the right to "intimate associations" for a limited period of time in a motel room should not be governed by an Ordinance that requires that the motel space be purchased for a minimum time period. The society that makes up the City of Dallas has every right to encourage its individual members to follow particular traditions in expressing affection for one another and in gratifying their personal desires and goals. The City of Dallas may prohibit an individual from imposing his will on another to satisfy his own selfish interest. The City of Dallas may also prevent an individual from interfering with, or violating, a legally sanctioned and protected relationship, such as marriage. The City of Dallas may explain the relative advantages and disadvantages of different forms of intimate expression. But when a City Ordinance attempts to conduct citizens' intimate relations by decreeing that they must rent a motel room for a set period of time, or that the motel owner must rent a motel room for a set period of time, it is a matter for the individuals, and the motel owner involved, not for the City of Dallas, to decide.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Judgment of the United States Court of Appeals for the Fifth Circuit be, in all respects, reversed.

Frank P. Hernandez
5999 Summerside, Suite 101
Dallas, Texas 75252
(214)931-9444
(Counsel of Record)

Supreme Court, U.S.
FILED
JUL 20 1989

JOSEPH P. SPANGLER, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1989

NO. 87-2012

FW/PBS, INC., et al.,

v. *Petitioners,*

CITY OF DALLAS, TEXAS, et al.,

Respondents.

NO. 87-2051

M.J.R., INC., et al.,

v. *Petitioners,*

CITY OF DALLAS, TEXAS, et al.,

Respondents.

NO. 88-49

CALVIN BERRY, III, et al.,

v. *Petitioners,*

CITY OF DALLAS, TEXAS, et al.,

Respondents.

On Writs Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS CITY OF DALLAS, et al.

ANABELLE MUNCY

City Attorney

KENNETH C. DUFFEL

Counsel of Record

First Assistant City Attorney

THOMAS P. BRANDT

Assistant City Attorney

Office Of The City Attorney

7BN City Hall

1500 Marilla Street

Dallas, Texas 75201

214/670-3510

Attorneys for Respondents

BEST AVAILABLE COPY

47142

QUESTIONS PRESENTED

1. Does the temporary denial or revocation of a license to operate a sexually oriented business based on convictions for specified crimes that are demonstrated to proliferate in neighborhoods surrounding such businesses, impose a prior restraint on protected expression or improperly single out businesses engaged in First Amendment protected activities?
2. Are the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51 (1965), applicable to the license denial and revocation provisions of the Dallas sexually oriented business ordinance?
3. Do the provisions of the Dallas sexually oriented business ordinance relating to adult motels violate the First, Fourth, Fifth and Fourteenth Amendments or any constitutionally protected freedom of association?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT.....	6
ARGUMENT	10
I. THE LICENSE DENIAL AND REVOCATION PROVISIONS OF THE DALLAS SEXUALLY ORIENTED BUSINESS ORDINANCE DO NOT IMPOSE A PRIOR RESTRAINT ON THE DIS- SEMINATION OF CONSTITUTIONALLY PRO- TECTED EXPRESSION.....	10
A. The temporary denial or revocation of a license to operate a sexually oriented busi- ness based on convictions for crimes that are demonstrated to proliferate in neighbor- hoods surrounding such businesses, is in furtherance of the city's substantial govern- mental interests and does not impose a prior restraint	10
1. Enforcement of the license denial and revocation provisions in the Dallas sex- ually oriented business ordinance does not resemble the enforcement activity in other cases where the Court has found a prior restraint	10
2. The Dallas ordinance does not single out businesses engaged in expressive activities for regulation and closure ...	15

TABLE OF CONTENTS - Continued

	Page
3. A city may properly rely on convictions for sexually related crimes that include an element of unprotected expressive activity to temporarily disqualify a person from holding a sexually oriented business license.....	17
4. The Dallas ordinance causes no ascertainable restriction on the public's access to constitutionally protected sexually oriented materials.....	21
B. The procedural safeguards required in <i>Freedman v. Maryland</i> , 380 U.S. 51 (1965) are not applicable to the Dallas sexually oriented business ordinance	22
1. The Dallas ordinance contains no censorship of expressive materials	23
2. The licensing requirements of the Dallas ordinance are a valid means of ensuring enforcement of the location restrictions and are in furtherance of the city's purpose of reducing the deleterious effects of sexually oriented businesses on surrounding neighborhoods	25
3. The license denial and revocation provisions of the Dallas ordinance contain ample procedural safeguards for a non-censorship regulation that only incidentally affects speech.....	26

TABLE OF CONTENTS - Continued

	Page
II. THE DALLAS ORDINANCE, WHICH AFFECTS EXPRESSION ONLY INCIDENTALLY AND ONLY IN FURTHERANCE OF SUBSTANTIAL GOVERNMENTAL INTERESTS WHOLLY UNRELATED TO THE REGULATION OF EXPRESSION, IS VALID UNDER <i>RENTON V. PLAYTIME THEATRES, INC.</i> , 475 U.S. 41 (1986) AND <i>UNITED STATES V. O'BRIEN</i> , 391 U.S. 367 (1968) ...	27
III. THE DALLAS ORDINANCE'S ADULT MOTEL REGULATIONS DO NOT VIOLATE THE FIRST, FOURTH, FIFTH, OR FOURTEENTH AMENDMENTS OR ANY CONSTITUTIONALLY PROTECTED FREEDOM OF ASSOCIATION	34
CONCLUSION	40

TABLE OF AUTHORITIES

Page

CASES

<i>Arcara v. Cloud Books, Inc.</i> , 478 U.S. 697 (1986)	16, 18, 19, 20, 33
<i>California v. Taylor</i> , 353 U.S. 553 (1957)	35
<i>Cox v. New Hampshire</i> , 312 U.S. 569 (1941)	32
<i>Dumas v. City of Dallas</i> , 648 F. Supp. 1061 (N.D. Tex. 1986)	<i>passim</i>
<i>Euclid v. Amber Realty Co.</i> , 272 U.S. 365 (1926)	40
<i>Fort Wayne Books, Inc. v. Indiana</i> , 489 U.S. ___, 109 S. Ct. 916, 103 L.Ed.2d 34 (1989)	7, 18, 19, 20
<i>Freedman v. Maryland</i> , 380 U.S. 51 (1965)	<i>passim</i>
<i>FW/PBS, Inc. v. City of Dallas</i> , 837 F.2d 1298 (5th Cir. 1988)	<i>passim</i>
<i>Lawn v. United States</i> , 355 U.S. 339 (1958)	35
<i>Marshall v. Barlow's Inc.</i> , 436 U.S. 307 (1978)	39
<i>National Socialist Party v. Village of Skokie</i> , 432 U.S. 43 (1977)	6, 22, 23
<i>Near v. Minnesota</i> , 283 U.S. 697 (1931)	6, 10, 11, 12, 13
<i>Renton v. Playtime Theaters, Inc.</i> , 475 U.S. 41 (1986)	<i>passim</i>
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	38, 39
<i>Shelton v. City of College Station</i> , 780 F.2d 475 (5th Cir. 1986) (<i>en banc</i>), cert. denied, 477 U.S. 905 (1986) and 479 U.S. 822 (1986)	40
<i>Texas v. Johnson</i> , ___ U.S. ___, 57 U.S.L.W. 4770 (U.S. June 21, 1989)	28
<i>United States v. Albertini</i> , 472 U.S. 675 (1985)	32, 33, 34

TABLE OF AUTHORITIES - Continued

	Page
<i>United States v. Biswell</i> , 406 U.S. 311 (1972).....	39
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)	9, 27, 28, 31, 32, 34
<i>Vance v. Bradley</i> , 440 U.S. 93 (1979).....	40
<i>Vance v. Universal Amusement Co.</i> , 445 U.S. 308 (1980)	6, 10, 12, 13, 22, 23
<i>Virginia Pharmacy Board v. Virginia Citizens Con- sumer Council Inc.</i> , 425 U.S. 748 (1976)	30
<i>Ward v. Rock Against Racism</i> , ___ U.S. ___, 57 U.S.L.W. 4879 (U.S. June 20, 1989)	28, 33
<i>Youakim v. Miller</i> , 425 U.S. 231 (1976).....	35
<i>Young v. American Mini Theatres, Inc.</i> 427 U.S. 50 (1976)	passim
 OTHER AUTHORITIES	
Dallas City Code §§41A et. seq.....	passim
G. Anastaplo, <i>The Constitutionalist: Notes on the First Amendment</i> (1971)	15
G. Anastaplo, <i>The Constitution of 1787: A Commen- tary</i> (1989).....	28

Nos. 87-2012, 87-2051, and 88-49

In The
Supreme Court of the United States
October Term, 1989

NO. 87-2012
FW/PBS, INC., et al.,

Petitioners,
v.

CITY OF DALLAS, TEXAS, et al.,
Respondents.

NO. 87-2051
M.J.R., INC., et al.,

Petitioners,
v.

CITY OF DALLAS, TEXAS, et al.,
Respondents.

NO. 88-49
CALVIN BERRY, III, et al.,

Petitioners,
v.

CITY OF DALLAS, TEXAS, et al.,
Respondents.

On Writs Of Certiorari To The United States Court Of
Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS CITY OF DALLAS, et al.

STATEMENT OF THE CASE

In the early summer of 1986, after a thorough investigation of the facts and law involved (DX 3), the City of Dallas began to consider specific means of regulating the deleterious effects of sexually oriented businesses upon the community.

The first formal consideration of a proposed ordinance occurred at a public hearing before the Dallas Plan Commission on June 12, 1986. After considering the experiences of at least eight other cities and counties (DX 3 and DX 5), the testimony of numerous citizens (DX 1 and DX 2 p. 2), and evidence concerning possible locations available under the ordinance (DX 15), the fifteen member Plan Commission voted unanimously in favor of adopting the ordinance. The transcript of the Plan Commission hearing shows that the Plan Commission was convinced that sexually oriented businesses cause harmful secondary effects to surrounding neighborhoods (DX 1 pp. 23, 49, 51-52, 57-58) and that the members of the Plan Commission were attempting to control these secondary effects and not the content of sexually oriented materials (DX 1 pp. 23, 48-52, 57).

The Dallas City Council considered the Plan Commission's unanimous recommendation as well as the eight municipal studies and the map indicating available locations. The City Council also considered a Dallas study which found a 90 percent higher crime rate near sexually oriented businesses than in other business areas (DX 19 and 20). On June 18, 1986, the Dallas City Council voted unanimously in favor of adopting Ordinance No.

19196, which added a new Chapter 41A (the Dallas ordinance) to the Dallas City Code.

In adopting the ordinance, the Council made legislative findings that sexually oriented businesses are frequently used for unlawful sexual activities, have a deleterious effect on surrounding businesses and neighborhoods, and cause increased crime and decreased property values.¹

¹ The Dallas City Council made the following findings:

- (1) Sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature;
 - (2) that the city police have made a substantial number of arrests for sexually related crimes in sexually oriented business establishments;
 - (3) that concern over sexually transmitted diseases is a legitimate health concern of the city which demands reasonable regulation of sexually oriented businesses in order to protect the health and well-being of the citizens;
 - (4) that licensing is a legitimate and reasonable means of accountability to ensure that operators of sexually oriented businesses comply with reasonable regulations and to ensure that operators do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation;
 - (5) that there is convincing documented evidence that sexually oriented businesses, because of their very
- (Continued on following page)

The ordinance requires sexually oriented businesses to locate at least 1000 feet from a church, school, residential district, park adjacent to a residential district, a residential lot, or another sexually oriented business.

(Continued from previous page)

nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values;

- (6) that sexually oriented businesses have serious objectionable operational characteristics particularly when they are located in close proximity to each other, thereby contributing to urban blight and downgrading the quality of life in adjacent areas;
- (7) that it is in the interest of public safety and welfare to prohibit persons convicted of certain crimes from engaging in the occupation of operating sexually oriented businesses;
- (8) that the crimes listed in Section 41A-5(a)(10) are serious crimes which are directly related to the duties and responsibilities of the occupation of operating sexually oriented businesses;
- (9) that the occupation of operating sexually oriented businesses brings a person into constant contact with persons interested in sexually oriented materials and activities thereby giving the person repeated opportunities to commit offenses against public order and decency should he be so inclined; and
- (10) that a person who has been convicted of a crime listed in Section 41A-5(a)(10) is presently unfit to operate any sexually oriented businesses until the respective time periods designated in that section expire. (DX 16, pp. 1-5).

§ 41A-13(a) & (b). A three-year amortization period was provided for nonconforming uses. § 41A-13(f). Licensing requirements were imposed to assist in the enforcement of the ordinance.

Petitioners filed three separate complaints in the United States District Court for the Northern District of Texas, Dallas Division, challenging all aspects of the ordinance and seeking declaratory and injunctive relief. The three complaints were consolidated and the case was presented to the District Court on cross motions for summary judgment. The District Court found the ordinance constitutional except for four minor exceptions. Those provisions have since been deleted (See FW/PBS App. to Pet. for Writ of Cert., App. 103-111) and are not in issue here.

Petitioners appealed to the United States Court of Appeals, Fifth Circuit. The Court of Appeals upheld the constitutionality of the Dallas ordinance and rejected petitioners' challenge. Judge Thornberry concurred in part and dissented in part.

This Court on May 4, 1988, stayed the decision of the Court of Appeals except for its holding that the provisions of the ordinance regulating the location of sexually oriented businesses do not violate the Federal Constitution. On February 27, 1989, this Court granted petitioners' writs of certiorari limited to questions I, II and III in case No. 87-2012; questions 1 and 2 in case No. 87-2051; and both questions in case No. 88-49. All issues relating to the Dallas ordinance's locational restrictions were excluded from review.

SUMMARY OF ARGUMENT

I. The questions accepted for review in this case involve the right of a city to temporarily deny or revoke a license to operate a sexually oriented business because a person seeking or holding a license has been recently convicted of at least one of thirteen sexually related crimes. The Dallas ordinance, which has as its primary enforcement tool a restriction on the location of sexually oriented businesses, was adopted after examination of studies conducted in other cities which documented that sexually oriented businesses have a deleterious effect on both existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values. In response to these studies and to a report demonstrating higher levels of crime, especially sexually related crime, associated with these businesses in Dallas, the City Council adopted the ordinance to address the crime problem as well as the other deleterious effects of sexually oriented businesses.

Petitioners argue that the license denial and revocation provisions of the ordinance impose a prior restraint on constitutionally protected speech and do not provide required procedural safeguards. The enforcement of this ordinance, however, does not carry with it any of the attributes of prior restraint that are condemned in *Near v. Minnesota*, 283 U.S. 697 (1931), *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977), or *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), the cases relied upon by petitioners for their assertion. No license is required for any speech, publication, or movie. The Dallas ordinance is not concerned with the content of materials or

services sold at a sexually oriented business; rather the purpose of the ordinance is to protect neighborhoods and reduce the crime associated with these businesses.

Since the ordinance regulates many types of sexually oriented businesses, including those which have no expressive activity associated with them, the assertion that businesses engaged in expressive activities are singled out for regulation and closure has no basis. Neither do the sexually related crimes used for disqualification single out expressive activity. Only three of the thirteen crimes are related to illegal expressive activity, i.e., obscenity; the sale, distribution, or display of material harmful to a minor; and possession of child pornography. See § 41A-5(a)(10), J.A. 18-19. It would be illogical for the city to exclude these sexually related crimes from the disqualifications simply because they involve unprotected speech. The use of obscenity as a predicate offense for government enforcement against sexually related businesses has been upheld in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. ___, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989). Conviction for obscenity as a temporary disqualification in the Dallas ordinance has less dire consequences upon the availability of expressive material than obscenity as a predicate offense in *Fort Wayne Books*. Under Indiana law, a RICO prosecution can result in forfeiture of materials, imprisonment, and a ban on conducting business.

Because those who operate sexually oriented businesses generally convey other peoples' messages, if one operator is forced to close because of criminal convictions, the amount of material available to the public will not be diminished. The demand for sexually oriented material and the likely competition for locations under

the location restrictions of the ordinance, will result in a new purveyor taking his place and, more than likely, buying his stock-in-trade.

Petitioners argue that the license denial and revocation provisions of the ordinance are defective because they do not provide the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51 (1965). These safeguards are required in cases involving a prior restraint on sale or publication. As previously argued, the Dallas ordinance does not have any of the attributes of prior restraint. Since the ordinance does not seek to suppress the content of any expressive material and nothing in the licensing scheme regulates the content of any expressive material, the Court of Appeals correctly held that "the Ordinance need only meet the standards applicable to time, place, and manner restrictions and need not comply with *Freedman's* more stringent limits on regulations aimed at content." *FW/PBS, Inc. v. Dallas*, 837 F.2d 1298, 1303 (5th Cir. 1988) (See also, *FW/PBS App. to Pet. for Writ of Cert.*, App. 1-30).

II. The Dallas ordinance is valid under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), as a content-neutral time, place, and manner regulation designed to serve a substantial government interest in protecting neighborhoods from the negative secondary effects of sexually oriented businesses while not unreasonably limiting alternative avenues of communication. If the license denial and revocation provisions are separated from the rest of the ordinance for analysis, the fact that they may not fit neatly into the time, place, and manner category should not deter the Court from analyzing them under the same standard since they meet the same criteria.

Application of the test established in *United States v. O'Brien*, 391 U.S. 367 (1968), to the license denial and revocation portion of the ordinance brings its validity into sharper focus. The substantial governmental interest in protecting neighborhoods surrounding sexually oriented businesses is unrelated to the suppression of free expression. The disqualification provisions are narrowly tailored to apply only to businesses which have been documented as causing adverse secondary effects, and only to the crimes which are most prevalent in and around these types of businesses. For these reasons, the license denial and revocation provisions of the ordinance are valid.

III. The adult motel petitioners are not regulated under the ordinance on the basis of any expressive activity but because they rent rooms for short periods of time. For this reason, the ordinance is valid as applied to them since it is rationally related to the city's legitimate interest in curbing prostitution and other sex-related crimes in the city's neighborhoods. Nevertheless, the studies relied upon by the city justify the regulation of any adult motels which do advertise the availability of sexually oriented movies or videos and are thus brought under the ordinance because of expressive activity. The rationale for including them in the regulations is the same as for adult motion picture theaters and adult arcades. The arguments of the motel petitioners do not substantiate any of their asserted constitutional claims, and the Court must uphold the adult motel provisions of the ordinance as valid.

ARGUMENT

I. THE LICENSE DENIAL AND REVOCATION PROVISIONS OF THE DALLAS SEXUALLY ORIENTED BUSINESS ORDINANCE DO NOT IMPOSE A PRIOR RESTRAINT ON THE DISSEMINATION OF CONSTITUTIONALLY PROTECTED EXPRESSION.

By refusing to accept for review any of the issues raised by petitioners concerning the location restrictions of the Dallas sexually oriented business ordinance, this Court has left standing the holdings from the lower courts regarding the validity of the underlying purpose and effect of the ordinance. The adult cabaret petitioners argue extensively that the licensing scheme as a whole in the Dallas ordinance is invalid. See Brief of Petitioners M.J.R., Inc., et al. at 9-21. This Court, however, accepted for review the narrow questions of whether the denial or revocation of a license on the basis of prior criminal convictions imposes a prior restraint or inevitably singles out persons engaged in First Amendment protected activity for regulation and closure.

A. The temporary denial or revocation of a license to operate a sexually oriented business based on convictions for crimes that are demonstrated to proliferate in neighborhoods surrounding such businesses is in furtherance of the city's substantial governmental interests and does not impose a prior restraint.

1. Enforcement of the license denial and revocation provisions in the Dallas sexually oriented business ordinance does not resemble the enforcement activity in other cases where the Court has found a prior restraint.

Petitioners rely on *Near v. Minnesota*, 283 U.S. 697 (1931), and *Vance v. Universal Amusements*, 445 U.S. 308

(1980), for the proposition that the license denial and revocation provisions of the Dallas sexually oriented business ordinance impose a prior restraint upon expressive material. Their reliance is misplaced in both instances. Unlike the Dallas case, those two cases considered the use of state nuisance statutes to enjoin the future publication or dissemination of expressive material.

In *Near*, a publication was enjoined and thus made unavailable because of what its publisher had said on previous occasions. Under the Dallas ordinance, no publication is made unavailable because of the enforcement of the ordinance, nor need the number of sexually oriented businesses in the city be reduced. Rather, the ordinance attempts to curb identifiable persons who may reasonably be expected, because of their conduct in recent years, to promote, permit, or participate in the criminal conduct that sexually oriented businesses have been shown to foster.

The offender in *Near* had addressed serious political issues, albeit in a virulently anti-Semitic way. In the Dallas case, there is no claim that any political or religious discourse would be in any way restrained by the Dallas ordinance. The attempt in *Near* was to prevent the publisher from repeating his conduct in publishing scandalous material. The Dallas ordinance does not prevent anyone from repeating the crimes for which he has been convicted. Rather, the ordinance attempts to remove from certain licensed businesses persons whose recent criminal history strongly suggests that they will be inclined or easily tempted to engage in the criminal conduct to which sexually oriented businesses are particularly susceptible.

The prohibition placed on the offending person in *Near* was perpetual; the disability under the Dallas ordinance can be cured in a few years if the person avoids certain criminal conduct. In *Near*, the publication was the target of the enforcement without regard to the criminal record of the publisher. In the Dallas ordinance, the target is the methods of operating sexually oriented businesses that encourage crime.

Unlike the situation in *Near*, the materials and activities of sexually oriented businesses will continue to be widely available in Dallas even if the ordinance is vigorously enforced. Indeed, even a person who is disqualified under the ordinance could continue to distribute such materials wholesale or by mail order. If the defendant in *Near* could not publish his newspaper, however, his political viewpoint would not have been available to any significant degree in the community. The suppression of a publication or viewpoint is neither the intended nor the likely consequence of the Dallas ordinance. The ordinance does nothing to make sexually explicit materials any less generally available than they would otherwise be.

Vance involved state statutes authorizing injunctions to issue against the future exhibition of unnamed films that depict particular acts enumerated in the state's obscenity statute. These statutes resulted in the direct regulation of the content of motion pictures. This Court found that the statutes in *Vance* authorized prior restraints and were procedurally deficient. Like *Near*, *Vance* involved censorship of the future dissemination of expressive material, before the material was made available to the public.

The Dallas ordinance has no attributes of censorship. It does not call for the review of or prevent the publication or dissemination of any expressive material. It merely attempts to prevent, for a limited time, those persons convicted of certain crimes from engaging in a business that has a demonstrated relationship with those crimes. The ordinance is concerned only with the qualifications of those who may engage in a crime-sensitive business. It does not attempt to regulate the content of what is sold. Its purpose is not to suppress expressive material, but to reduce crime.² In neither *Near* nor *Vance* was there a criminal conviction prior to enforcement. In fact, the purpose of the statute in each of those cases was to avoid the state's onerous burdens under the criminal law. Under the Dallas ordinance, a person does not lose a sexually oriented business license until he is actually convicted of certain crimes.

² The Dallas City Council clearly stated its purpose and intent in passing the ordinance:

It is the purpose of this chapter to regulate sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. (J.A. 8-9).

Judge Thornberry's statement in his concurring and dissenting opinion below, that the "denial of a license to engage in speech is . . . the classic prior restraint . . . " [FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1307 (5th Cir. 1988)] is not appropriate to this case. The Dallas ordinance does not license people to engage in speech. It merely licenses people to operate sexually oriented businesses at particular locations. No license is required by this ordinance for any speech or publication, regardless of the sexually explicit content. An unlicensed person may write, create, publish, sell wholesale, sell through the mail, or give away sexually explicit material. In fact, an unlicensed person may operate a bookstore, so long as it does not have as one of its principal business purposes the sale of sexually explicit materials. Indeed, no license is required for most bookstores or video stores in the city.³ The underlying basis of Judge Thornberry's dissent seems to be his view that a license denial has the effect of totally banning speech. This view is mistaken. Since the grant of a license does not authorize one to engage in

³ The assertion by the American Booksellers Association, et al., *amici curiae* brief in support of petitioners (Booksellers Br. 15-16) that virtually all bookstores or video stores will be subject to the ordinance is a mistaken interpretation of the requirements of the ordinance. Even petitioners do not make this claim. The ordinance definition of adult bookstore or adult video store is limited to commercial establishments which have as one of their *principal* business purposes the sale or rental of sexually explicit materials. See § 41A-2(2), J.A. 10. There are currently only 37 (Source: City of Dallas records) adult bookstores or adult video stores required to be licensed out of approximately 196 retail bookstores and 201 retail video stores in the city. Source: Greater Dallas Southwestern Bell Yellow Pages December 1988-89, pp. 344-48, 1860-61.

speech, its denial does not prevent one from engaging in speech. The concept of prior restraint is not relevant here. No speech is banned and no materials are censored.

Finally, the stringency of the rule against prior restraints rests in large part on the matter of who bears the burden of proof. There is a great difference between a publisher's having to persuade a censor that his yet-to-be-published manuscript is worthy of publication and a prosecutor's having to persuade a jury that an already published manuscript is so unworthy of publication as to be criminal.⁴ That there is no shift in the burden-of-proof, and in fact, a burden of proof question is in no way raised by the enforcement of the Dallas ordinance, are further indications that there is no genuine prior restraint consideration involved.

2. The Dallas ordinance does not single out businesses engaged in expressive activities for regulation and closure.

Although it is proper to reasonably classify businesses involved in even expressive activity, the Dallas ordinance does not, as the adult cabaret petitioners argue, single out for regulation those businesses engaged in expressive activities. The ordinance regulates all sexually oriented businesses, including businesses that offer no expressive activities at all, such as escort agencies, sexual encounter centers, nude modeling studios, and certain

⁴ See George Anastaplo, *The Constitutionalist: Notes on the First Amendment* (Dallas: Southern Methodist University Press, 1971), p. 680 n. 18.

adult motels.⁵ Neither do the disqualifications single out those engaged in expressive activities. Only three out of the thirteen disqualifying crimes involve any use of expressive materials and then only materials that are constitutionally unprotected.

Petitioners cite *Arcara v. Cloud Books, Inc.*, 478 U.S. 647 (1986), as support for their "singling out" theory. But there, this Court upheld the closing of a bookstore by the enforcement of a public health regulation of general application. The Court applied no First Amendment scrutiny in *Arcara* because the sexual activity for which the bookstore was closed manifested "absolutely no element of *protected* expression." *Id.* at 705 (emphasis added). Likewise, under the Dallas ordinance, a license denial or revocation predicated on convictions for specified crimes involves absolutely no element of protected expression. Only three of the crimes are at all related to expressive activities (obscenity; the sale, distribution, or display of material harmful to a minor; and possession of child pornography), and the requirement of conviction for these crimes removes any question about the presence of an element of protected expression. By their nature as crimes, these offenses represent activity associated only with unprotected expression. It is clear that the Dallas ordinance does not single out persons or businesses

⁵ The Court majority in *Renton* was not disturbed by the fact that the ordinance then under review singled out only adult motion picture theaters for regulation. This fact was noted by the dissent. *Renton*, 475 U.S. at 57 (Brennan, J. dissenting).

engaged in First Amendment protected activities either for general regulation or for license denial or revocation.

3. A city may properly rely on convictions for sexually related crimes that include an element of unprotected expressive activity, to temporarily disqualify a person from holding a sexually oriented business license.

It is not unusual for regulatory authorities to include various kinds of criminal conduct as a disqualification for persons to hold licenses in regulated businesses. In fact, the City of Dallas makes such provisions in many of its ordinances. See § 6A-7(2) in Amusement Center ordinance, J.A. 54; and § 14-11(b)(6) in Dance Hall ordinance, J.A. 68, for two examples.⁶ These eligibility requirements are generally for the safety of the patrons as well as the surrounding communities.

The bookselling and video petitioners mischaracterize the purpose of the license disqualification provisions of the ordinance as being the prevention of future speech crimes. This conclusion is based on the fact that three of the thirteen crimes that serve as disqualifications are crimes that involve expression, that is, obscenity; the sale, distribution, or display of harmful material to a minor; and possession of child pornography. The purpose of the ordinance, however, is to minimize sexually related crimes that have been documented to proliferate in areas

⁶ The sections of these ordinances cited here are correct. Other portions of these ordinances as printed in the Joint Appendix do not include all current amendments.

surrounding sexually oriented businesses.⁷ The city has selected as one method of accomplishing this purpose, the disqualification of offenders who, because of their sex-related crimes, should not be trusted with the operation of sexually oriented businesses because those businesses are highly susceptible to criminal abuse. It would be contrary to the stated purpose of the ordinance and certainly illogical for the city to issue a sexually oriented business license to a person who had recently been convicted of crimes the ordinance seeks to control. A conviction for promotion of prostitution would clearly justify the denial or revocation of a sexually oriented business license. cf. *Arcara*, 478 U.S. 697 (1986). It is erroneous to argue that the First Amendment provides a shield to a person whose sexually related crime happens to be obscenity.

The Court has recognized this general principle in approving the use of obscenity convictions as a predicate offense for prosecution under the Indiana RICO statute in *Fort Wayne Books v. Indiana*, 489 U.S. ___, 109 S.Ct. 916, 103

⁷ The City of Dallas considered studies conducted by the following cities, counties and organizations: Austin, Texas (DX 6); Indianapolis, Indiana (DX 7); Houston, Texas (DX 8); Beaumont, Texas (DX 9); Amarillo, Texas (DX 10); City of Los Angeles, California (DX 11); Phoenix, Arizona (DX 12); Las Vegas, Nevada (DX 13); Seattle, Washington (DX 14); Los Angeles County, California (summarized in DX 6); St. Paul, Minnesota (summarized in DX 6); and Vantex Enterprises, Inc., d/b/a Sheraton Mockingbird West (DX 21 and 22). The City of Dallas also conducted its own study (DX 19 and 20). These studies were consistent in their findings that higher crime rates and lower property values were directly related to sexually oriented businesses.

L.Ed.2d 34 (1989). Since conviction under a RICO statute can result in the forfeiture of all assets used and acquired in the course of "racketeering" activity, this holding could have more dire consequences for the suppression of expressive materials than the temporary disqualification imposed by the Dallas ordinance. If there is "no constitutional bar to the State's inclusion of substantive obscenity violations among the predicate offenses under its RICO statute" (*Id.* 103 L.Ed.2d at 50), there can be no constitutional bar to the inclusion of a substantive obscenity conviction among the predicate crimes that serve as a temporary disqualification from holding a license to operate a sexually oriented business.

Petitioners point to the concurring opinion in *Arcara* as support for their argument that obscenity is an improper predicate offense for license denial or revocation. The concurring opinion warns that if "a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns." The Dallas ordinance, however, is not a pretext for closing down sexually oriented businesses. Quite the contrary, the ordinance acknowledges the legal status of such businesses by providing them a license to operate. Even so, the city is not arguing that the ordinance does not raise First Amendment concerns, only that these concerns are addressed under the proper standard of review.⁸ (See the discussion in Part II of this Brief.)

⁸ The Court in *Arcara* made one point that deserves attention. Respondents in *Arcara* argued that the effect of the statu-

(Continued on following page)

(Continued from previous page)

tory closure impermissibly burdened its First Amendment-protected book selling activities. The Court observed that "the severity of this burden is dubious at best, and is mitigated by the fact that respondents remain free to sell the same materials at another location." *Id.* at 705. Although the Dallas license denial and revocation provisions would temporarily disqualify a person from operating a sexually oriented business at any location within the city, this burden is not sufficient to warrant strict scrutiny because the regulation only indirectly affects speech, and the only speech that is indirectly affected is considered to be of a lesser value. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 and 70 (1976); *Renton*, 475 U.S. at 49 n. 2.

The Brief of amicus curiae, PHE, Inc., in support of petitioners, asserts that such literary works as *Ulysses* and *The Canterbury Tales* will be affected by the Dallas ordinance. PHE Br. 12. This assertion is erroneous since § 41A-21(e) of the ordinance (See J.A. 37) provides an exception under both the licensing and location requirements for material that contains serious literary, artistic, political, or scientific value. It is clear that what sexually oriented businesses serve is not a creative literary and political culture, as described in the amici curiae brief of American Booksellers Association (Booksellers Br. 4), but rather the right of entrepreneurs to profit from the base gratification of others. The customers of sexually oriented businesses are hardly interested in Joyce or Chaucer. They are seeking sexual satisfaction (see, for example, DX 33). As aptly stated in the dissenting and concurring opinion of Justice Stevens in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. ___, 103 L.Ed. at 65 (1989), "Many sexually explicit materials are little more than noxious appendages to a sprawling media industry." While the right to sell this material is a constitutionally protected right, sexually explicit material has been recognized as a form of expression in which there is "a less vital interest in uninhibited exhibition . . . than in the free dissemination of ideas of social and political significance" *American Mini Theatres*, 427 U.S. at 61; *Renton*, 475 U.S. at 49 n. 2.

4. The Dallas ordinance causes no ascertainable restriction on the public's access to constitutionally protected sexually oriented materials.

This Court has declined to hear petitioners' challenges to the location restrictions of the Dallas ordinance. Location restrictions would appear to have greater impact on the operation of sexually oriented businesses than licensing regulations, since many nonconforming businesses will have to move or change their operations at the end of the three-year amortization period. See § 41A-13(f), J.A. 27. Although a particular purveyor disqualified by a criminal conviction may be temporarily unable to sell sexually explicit materials or services at a sexually oriented business, the competition for locations will, without doubt, result in a new purveyor taking his place, as well as acquiring his stock-in-trade, and public access to sexually oriented materials and services will not be diminished.⁹

As discussed in the concurring opinion in *American Mini Theatres*, "the central First Amendment concern remains the need to maintain free access of the

⁹ In fact, Petitioner FW/PBS, Inc. argued in its brief to the Court of Appeals that between 106 and 114 currently operating sexually oriented businesses (not to mention new sexually oriented businesses entering the market) would be competing for no more than 50 locations under the Dallas ordinance. If Petitioner is to be believed, the competition for locations should be fierce. (See Opening Brief of Appellant FW/PBS, INC., et al., filed at the United States Court of Appeals for the Fifth Circuit No. 86-1723 pp. 43, 45-46, 51).

public to the expression." *American Mini Theatres*, 427 U.S. at 77. Because the owners of sexually oriented businesses convey primarily the messages of others [See *Id.* at 78 n. 2 (Powell, J. concurring)], it is of little consequence to the availability of the materials or services, which purveyor operates the commercial enterprise that sells them. It is important, however, to the suppression of crime. This regulation will have the effect not of suppressing protected expressive materials, but of assuring that the merchants who purvey such materials are persons who do not by their own acts contribute further to the deleterious secondary effects of sexually oriented businesses.

B. The procedural safeguards required in *Freedman v. Maryland*, 380 U.S. 51 (1965) are not applicable to the Dallas sexually oriented business ordinance.

The procedural safeguards prescribed in *Freedman v. Maryland*, 380 U.S. 51 (1965) were designed to deal with a licensing and censorship system which called for routine submission of all motion pictures to a censor before the films could be shown publicly. Upon a decision by the censorship board, a film could be found to be unprotected and thereby barred from exhibition until the exhibitor undertook a time-consuming appeal to the Maryland courts. *Id.* at 54. In *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), this Court found the *Freedman* safeguards applicable to an attempt to use the Texas public nuisance statute to enjoin the future exhibition of unnamed films that depicted particular acts enumerated in the state's obscenity statute. Similarly, in *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977), this

Court invalidated a state court order enjoining petitioners from marching with swastikas and distributing materials which promote hatred against the Jewish faith, because the process used in imposing the injunction lacked the procedural safeguards of *Freedman*.

In each of these cases the government was seeking to suppress the content of undesired expression. The Court found that if "a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, . . . " *National Socialist Party*, 432 U.S. at 44. The policy behind requiring such strict safeguards is that it "is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. . . ." *Vance*, 445 U.S. at 316. The *Freedman* test is designed to place the burden in these circumstances on government to expedite the determination of whether expressive material, which the government wishes to suppress, is constitutionally protected. The license denial and revocation provisions of the Dallas ordinance contain none of the elements of censorship found in these cases.

1. The Dallas ordinance contains no censorship of expressive materials.

The obvious as well as announced purpose of the Dallas ordinance is to control the secondary effects of sexually oriented businesses on surrounding neighborhoods. These effects have been demonstrated to include the proliferation of crime, urban blight, and plummeting

property values. The license denial and revocation provisions of the ordinance contain no censorship features. Nothing in the licensing scheme regulates the content of any expressive materials purveyed on the premise of a sexually oriented business.

There are no subjective judgments to be made here by governmental officials administering the denial and revocation procedure. The chief of police is required to issue a license unless he finds one or more of ten objective statements to be true. See § 41A-5, J.A. 17-20. Objective criteria are provided throughout the ordinance as the basis for action by any city official that would adversely affect the holding of a license. None of the possible adverse actions is based on the content, or any determination concerning the content, of the expressive materials purveyed on the premises of a sexually oriented business.

For these reasons the Court of Appeals correctly found that "the Ordinance need only meet the standards applicable to time, place, and manner restrictions and need not comply with *Freedman's* more stringent limits on regulations aimed at content." *FW/PBS, Inc. v. City of Dallas*, 837 F.2d at 1303. The Court of Appeals determined that the license denial and revocation provisions would, in fact, withstand strict scrutiny since the city established a "compelling justification for barring those prone to . . . [sexually related] crimes from the management of . . . [sexually oriented] businesses." *Id.* at 1305. It did not see fit to discuss the *Freedman* procedural safeguards because those safeguards do not apply to a regulation that does not at all attempt to restrict the contents of any expressive material, named or unnamed.

2. The licensing requirements of the Dallas ordinance are a valid means of ensuring enforcement of the location restrictions and are in furtherance of the city's purpose of reducing the deleterious effects of sexually oriented businesses on surrounding neighborhoods.

In *American Mini Theatres*, this Court upheld an ordinance containing licensing procedures which granted a broader discretion to administrative officials than does the Dallas ordinance.¹⁰ In the present case, this Court declined to review the locational restrictions of the Dallas ordinance, thus leaving those regulations intact as affirmed by the Court of Appeals. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d at 1306. The licensing requirements of the ordinance are an integral and useful part of the enforcement of the locational restrictions.

A business must be in compliance with the locational restrictions to receive a license. By requiring each sexually oriented business to obtain a license, the city can pinpoint the location of each business for the purposes of measuring distances required by the restrictions. The city will have accurate records for determining compliance and for providing information to applicants about available locations. Further, without this regulatory system,

¹⁰ The Detroit ordinance gave the mayor power to refuse or revoke an adult theater license at any time upon proof of "the violation . . . , within the preceding two years, of any criminal statute . . . or [zoning] ordinance . . . which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby." *American Mini Theatres*, 427 U.S. at 91 (Blackmun, J. dissenting).

prospective sexually oriented businesses would be left to guess where other sexually oriented businesses are located. The licensing also benefits a business by assuring that its location is so documented that other businesses cannot move within 1000 feet and claim prior rights.

All of the regulatory components of the Dallas ordinance are aimed at controlling crime, protecting neighborhoods, maintaining property values, and preventing the spread of urban blight. The district court correctly pointed out, as the petitioners conceded, that licensing is a valid method of ensuring that regulated businesses abide by locational and other restrictions. *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1071 n. 26 (N.D. Tex. 1986).

3. **The license denial and revocation provisions of the Dallas ordinance contain ample procedural safeguards for a noncensorship regulation that only incidentally affects speech.**

While the procedural safeguards prescribed in *Freedman* are not applicable to the Dallas ordinance, the ordinance contains other procedural safeguards sufficient to protect the rights of applicants and license holders. It provides reasonable time periods within which the city must respond to applications and appeals. See § 41A-5, J.A. 17; and § 2-96(b), J.A. 39. The decisions of administrative officials must be based on objective criteria. An appeal to the permit and license appeal board from a suspension or revocation stays the action of the chief of police. See § 41A-11, J.A. 25. An appeal from the permit and license appeal board may be made to the state district court where a temporary restraining order may be

obtained to stay an order of the board pending a hearing on a temporary injunction or mandamus.

These procedures are more than adequate to protect the rights of persons engaged in an ongoing commercial enterprise, especially since the ordinance does not seek to regulate the content of any expressive material. Any effect that the ordinance's regulations may have on expressive material is incidental to the principal purpose of the ordinance to prevent the recognized secondary effects that sexually oriented businesses have on surrounding neighborhoods. For this reason the District Court was correct in its conclusion that *Freedman* is not applicable and that the "appeal, revocation, and suspension provisions are replete with procedural protections and reviewable standards" *Dumas v. City of Dallas*, 648 F.Supp. at 1075.

II. THE DALLAS ORDINANCE, WHICH 'AFFECTS EXPRESSION ONLY INCIDENTALLY AND ONLY IN FURTHERANCE OF SUBSTANTIAL GOVERNMENTAL INTERESTS WHOLLY UNRELATED TO THE REGULATION OF EXPRESSION, IS VALID UNDER *RENTON V. PLAYTIME THEATRES, INC.*, 475 U.S. 41 (1986) AND *UNITED STATES V. O'BRIEN*, 391 U.S. 367 (1968).

Not only are the license denial and revocation provisions of the Dallas ordinance content-neutral regulations that only indirectly affect expressive activities, but the activities which they affect are "of a wholly different, and lesser, magnitude than the interest in untrammelled political debate. . . ." *American Mini Theatres*, 427 U.S. at 70, and

Renton, 475 U.S. at 49 n. 2.¹¹ For these reasons, the Dallas ordinance merits the intermediate level of scrutiny offered by both *Renton* and *United States v. O'Brien*, 391 U.S. 367 (1968). While the *Renton* test has often been applied to time, place, and manner regulations, the *O'Brien* test has been used in situations that did not necessarily fit the time, place, and manner description. As this Court recently reiterated, however, the test under *O'Brien* "is little, if any, different from the standard applied to time, place, or manner restrictions." *Texas v. Johnson*, ___ U.S. ___, 57 U.S.L.W. 4770, 4772 (U.S. June 21, 1989); *Ward v. Rock Against Racism*, ___ U.S. ___, 57 U.S.L.W. 4879, 4884 (U.S. June 22, 1989).¹²

¹¹ To allow for appropriate distinctions between near obscenity and other forms of speech will not diminish the vitality of the First Amendment. In his article "How to Read the Constitution of the United States," *Loyola University of Chicago Law Journal*, Fall 1985, George Anastaplo observes:

After recognizing that political speech is at the heart of the "freedom of speech" clause, it is salutary to remind ourselves that our extensive freedom of political discussion did develop independent of the licentiousness to which we have recently become accustomed. Thus, neither principle nor history dictates that we must put up with licentiousness in order to have political freedom and effective self-government. *Ibid.*, 54.

See also, G. Anastaplo, *The Constitution of 1787: A Commentary* (Johns Hopkins University Press, 1989) at 321 n. 98.

¹² This Court also explained in *Ward v. Rock Against Racism* that the "least restrictive" analysis sometimes attributed to *O'Brien* no longer applies to content-neutral regulations that only indirectly affect expressive activities.

The Court of Appeals in this case noted that the "*Renton* standard of review applies to the details of the licensing scheme . . . even though the licensing scheme may regulate aspects of the businesses' operations other than location." *FW/PBS v. City of Dallas*, 837 F.2d at 1304. It thus found the licensing requirements were designed "to control the negative effects of a certain kind of business rather than to suppress a certain type of speech" (*Id.* at 1302) and are, therefore, as valid as the location restrictions that these requirements serve. For this reason, the Court of Appeals held that the "'time, place or manner' analysis cannot be limited solely to regulation of 'place.'" *Id.* at 1304.

Under *Renton*, "content-neutral" time, place, and manner regulations are constitutional if they are "designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Renton*, 475 U.S. at 47. The only part of the licensing scheme the Court of Appeals in *FW/PBS* did not immediately recognize as a time, place and manner regulation were the provisions relating to license disqualifications for criminal convictions. The court reasoned, however, that

The courts have not engaged in . . . strict scrutiny and have not otherwise required compelling necessity to justify other occupational bars attending a criminal conviction including those laced with activity protected by the first amendment such as labor organizing. In short, the city need only show that conviction and the evil to be regulated bear a substantial relationship.

We agree with the district court that the Ordinance now is well tailored sufficiently to achieve its ends. *FW/PBS, Inc. v. City of Dallas*. 837 F.2d at 1305.

Because of the direct and substantial relationship between the offense and the evil to be regulated and because of the fact that the denial or revocation is temporary, the Court of Appeals determined that the disqualification provisions should not be analyzed under a standard different from that applicable to the ordinance as a whole.

Content neutrality

It is settled that an ordinance may be considered a "content-neutral" regulation for purposes of analysis under *Renton*, even though it classifies businesses based on content, if its measures are aimed not at the content but rather at the secondary effects of the business on the surrounding community. *Renton*, 475 U.S. at 47-48. A regulation is content-neutral if it is justified without reference to the content of the regulated speech, *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). The license denial and revocation provisions of the Dallas ordinance are content-neutral because they are aimed at the secondary effects of sexually oriented businesses and not at the content of what is sold on the premises of the businesses, and the provisions are justified without reference to the content of the materials. Even the dissenting opinion in the Court of Appeals recognized that the Dallas ordinance is content-neutral. *FW/PBS v. City of Dallas*, 837 F.2d at 1308 (Thornberry, J. concurring in part and dissenting in part).

Governmental interests served

The Dallas ordinance is designed to serve the same vital governmental interests that were at stake in both

Renton and *American Mini Theatres*. A city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. *American Mini Theatres*, 427 U.S. at 71; *Renton*, 475 U.S. at 50.

Alternative avenues of communication

The Dallas ordinance as a whole has been held to provide reasonable alternative avenues of communication for sexually oriented businesses. *Dumas v. City of Dallas*, 648 F.Supp. at 1069-71; *FW/PBS v. City of Dallas*, 837 F.2d at 1303. Individuals who are temporarily denied licenses also have limitless alternative avenues of communication. They may write, create, publish, sell wholesale, sell through the mail, or give away sexually explicit material. They may even operate a bookstore so long as it does not have as one of its principal business purposes, the sale of sexually explicit materials. The only limitation on individuals convicted of certain crimes is that temporarily they cannot operate a specific type of commercial establishment.

This Court should thus uphold the Dallas ordinance as a "content-neutral" time, place, and manner regulation designed to serve a substantial governmental interest which does not unreasonably limit alternative avenues of communication. If the Court determines, however, that the license denial and revocation provisions should be separated for analysis, the fact that they do not fit neatly into the time, place, and manner category should not deter the court from analyzing them under the same standard of review. In all respects, they meet the same criteria as the other provisions of the ordinance. This becomes very clear when the *O'Brien* test is applied.

The O'Brien test

Under *O'Brien*, a regulation is justified despite its apparent impact on First Amendment interests (1) "if it is within the constitutional power of the government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, at 377.

First, the City of Dallas, unquestionably, has the constitutional authority to enact licensing ordinances of this type. *American Mini Theatres*, 427 U.S. 50; see also, *Cox v. New Hampshire*, 312 U.S. 569 (1941). Second, as already noted, the license denial and revocation provisions of the Dallas ordinance clearly further important and substantial governmental interests of crime control. Third, the legislative history of the ordinance demonstrates that the governmental interest promoted by the ordinance is unrelated to the suppression of free expression. *Dumas v. City of Dallas*, 648 F.Supp. at 1069; see also, *Id.* at 1064-65 nn. 8-10, 1069 n. 21.

Finally, any incidental restriction that the ordinance may place on an individual's First Amendment freedom is no greater than is essential for the furtherance of the city's important and substantial governmental interest. *Dumas v. City of Dallas*, 648 F.Supp. at 1069. This fourth prong of *O'Brien* must be approached with awareness of the admonitions of *Renton* and *United States v. Albertini*, 472 U.S. 675 (1985). This Court in *Renton* observed that cities "must be allowed a reasonable opportunity to

experiment with solutions to admittedly serious problems" and was careful not to second-guess the wisdom of the particular method chosen. *Renton*, 475 U.S. at 52. In *Albertini*, the Court insisted that time, place, or manner regulations are not invalid simply because there is some imaginable alternative that might be less burdensome on speech. *Albertini*, 472 U.S. at 689. While one might devise an alternative that is less restrictive than the license denial and revocation provisions of the Dallas ordinance, this court made its position on this subject very clear in *Ward v. Rock Against Racism*, ___ U.S. ___, 47 U.S.L.W. 4879 (U.S. June 20, 1989):

Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-intrusive means of doing so. *Id.* at 4884.

The license disqualification provisions are narrowly tailored to apply only to businesses which have been documented as routinely causing adverse secondary effects and only to the crimes which are most prevalent in and around these types of businesses.¹³ As the District Court pointed out:

This principle was squarely addressed in *Arcara v. Cloud Books, Inc.*, ___ U.S. ___, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986) (Burger, C.J.), in which the Court held that a sexually related business could be closed when management was aware of sexual behavior on

¹³ The District Court ruled that five enumerated crimes were not sufficiently related to the purpose of the ordinance. *Dumas v. City of Dallas*, 648 F.Supp. at 1074. The City Council subsequently amended the ordinance to remove those crimes.

the premises, in violation of law. If violation of law by a licensee may permissibly justify closure, it follows inescapably that one who has been convicted of a sex-related crime may be denied licensure. . . . One intent of the law was to prevent crime; the Ordinance considers only certain crimes to be relevant – such as prostitution, obscenity, or child pornography It allows even those convicted of such offenses to be licensed after a certain amount of time has elapsed. . . . It is thus narrowly tailored to avoid licensure of those who have recently shown a predilection toward the criminal conduct the Ordinance was designed to overcome. *Dumas v. City of Dallas*, at n. 34.

The licensing provisions of the Dallas ordinance satisfy the fourth element of the *O'Brien* test as elaborated by *Albertini*, in that they promote a substantial governmental interest that would be achieved less effectively in the absence of the regulation.

The *O'Brien* test was formulated and applied in a case upholding a regulation which indirectly affected highly protected political speech. Thus, the test's application to a regulation that indirectly affects expression of a much lesser value should require little debate. It is apparent that the license denial and revocation provisions of the Dallas ordinance are valid under the *O'Brien* test.

III. THE DALLAS ORDINANCE'S ADULT MOTEL REGULATIONS DO NOT VIOLATE THE FIRST, FOURTH, FIFTH, OR FOURTEENTH AMENDMENTS OR ANY CONSTITUTIONALLY PROTECTED FREEDOMS OF ASSOCIATION.

This Court accepted review of the adult motel regulations in the Dallas ordinance to determine whether those

regulations violate the First, Fourth, Fifth, or Fourteenth Amendments to the Constitution or any constitutionally protected freedom of association. Since the motel petitioners failed to argue a single Fifth or Fourteenth Amendment violation in their brief, those two issues must be settled in favor of the city. By petitioners' own admission, they have not challenged the Dallas ordinance on Fifth Amendment grounds. See Brief of Petitioners Calvin Berry, III, et al. at 4 (hereinafter Berry's Br.). The only issues which remain are the challenges under the First and Fourth Amendments and the challenge regarding associational freedoms.

The motel petitioners have asserted two issues not raised before. These include rights of commercial free speech (*Id.* at 14-15) and "the right to be let alone" (*Id.* at 13-14), neither of which have been previously argued in this case. Ordinarily, this Court does not decide questions not raised or resolved in the lower court except in exceptional circumstances. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); citing *California v. Taylor*, 353 U.S. 553, 557 n. 2 (1957); *Lawn v. United States*, 355 U.S. 339, 362-63 n. 16 (1958). There has been no attempt to show exceptional circumstances in this case; therefore, the Court should limit its review to issues that were considered below.¹⁴

¹⁴ In any case, petitioners do not explain the commercial free speech issue sufficiently to permit rebuttal. Their assertions regarding the "right to be let alone" seem to be similar to their privacy assertions. Indeed, their argument seems to be that they have a "right" not to be regulated in any way by the city.

The motel petitioners attack the Dallas City Council's findings as not specific enough (Berry's Br. 9-10); not supported by evidence (*Id.* at 12); and not " 'findings' at all, but purely speculative conclusions." *Id.* at 12. These attacks have no merit. The Court need only consider the studies and evidence contained in the record, (DX 1-2, 5-15, 17-18, 20 and 22); the unanimous findings of the City Plan Commission and the City Council (DX 16); the findings of the trial court (*Dumas v. City of Dallas*, 648 F.Supp. at 1076); and the conclusions of the Court of Appeals (*FW/PBS v. City of Dallas*, 837 F.2d at 1304-05), to realize that these attacks on the legislative findings have no basis.

Petitioners' First Amendment challenge is based on their assertion that the motel rooms they rent to the public have public access television transmissions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas." Berry's Br. 13. The ordinance definition creates three categories of activities that will bring a motel under the regulations for adult motels: (A) the offering and advertising, by way of a sign visible from the public right-of-way, of sexually explicit photographic reproductions available through television; (B) the offering of a sleeping room for rent for a period of time less than 10 hours; or (C) allowing the occupant of a sleeping room to subrent the room for a period of time less than 10 hours. See § 41A-2(4), J.A. 10.

By their own admission (Berry's Br. 4), petitioners' motels do *not* have a sign visible from the public right-of-way which advertises the availability of photographic

reproductions; therefore, they are not subject to the ordinance under Paragraph (A) of the definition and consequently are not being regulated on the basis of any First Amendment activity. In fact, there is nothing in the record of this case (other than the assertion in petitioners' brief) to verify that the motel rooms belonging to petitioners are equipped with television sets at all. The regulation of petitioners' adult motels is based solely upon the time period for which they rent rooms. Indeed, the Court of Appeals found, it "is certainly within reason that short rental periods facilitate prostitution . . ." (*FW/PBS v. City of Dallas*, 837 F.2d at 1304), and this type of criminal activity is what the ordinance seeks to suppress.

Having admitted that they are not regulated on the basis of any expressive activity, the petitioners' argument concerning lack of studies is irrelevant since extensive studies are not necessary to justify a business regulation that does not implicate the First Amendment. If, however, petitioners' motels had advertised in a way to subject themselves to the ordinance based on paragraph (A) of the definition, the city's substantial governmental interest in regulating adult motion picture theatres and adult arcades would have justified regulation of petitioners' adult motels. Both the theater and arcade uses have the same characteristics as motels that advertise sexually explicit videos or movies [See definitions in § 41A-2(1) and (5), J.A. 9-11]. The studies regarding those uses and adult motel uses (DX 6-14 and 19-22) substantiate the need for regulation.

One of Petitioners' Fourth Amendment challenges is based on their characterization of a motel room as a "temporary home." Berry's Br. 15. The assertion that a

stay in a motel room of less than 10 hours establishes a "temporary home" is without merit. Renting a motel room for two hours is more clearly associated with prostitution (*FW/PBS v. City of Dallas*, 837 F.2d at 1304), than with "the creation and sustenance of a family." *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984). This viewpoint is substantiated by the revealing statement in the motel petitioners' own brief that the "well-recognized 'quickie', the 'nooner', the 'one night stand' are traditional in America. . . ." Berry's Br. 19.

Petitioners mention the right to privacy many times in their brief. They do not explain, however, exactly how they believe anyone's right to privacy is being violated. To some extent their argument seems to be based upon their view of a motel room as a temporary home, but they also refer to the right to privacy of motel owners. Berry's Br. 14. In any case, no right to privacy issues are implicated in the Dallas ordinance.

Petitioners also attempt to find a Fourth Amendment issue by a cursory mention of the inspection section of the ordinance. Berry's Br. 19. The purpose, intent, and application of that section is to insure compliance with fire, safety, and other regulations, none of which apply to the activities of patrons who are renting rooms. The provision authorizes inspections when a business is occupied or open for business and was intended to limit the times at which businesses could be inspected. Furthermore, § 41A-7(c) specifically provides that the inspection provisions do not apply to rented motel rooms. In any case, under "the administrative search doctrine, searches to enforce regulatory standards may be reasonable in light of the reduced expectation of privacy in a pervasively

regulated business." *FW/PBS v. City of Dallas*, 837 F.2d at 1306, citing *United States v. Biswell*, 406 U.S. 311 (1972) and *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978). The Court of Appeals held that "sexually oriented businesses face a degree of regulation that renders the inspection provision presumptively reasonable." *FW/PBS v. City of Dallas*, 837 F.2d at 1306.

Finally, the Dallas ordinance does not violate motel owners' and operators' rights of intimate or expressive association. Motel owners and operators do not share with patrons a special community of thoughts, experiences, beliefs, nor the distinctively personal aspects of their lives. Motel patrons are numerous and motel owners are not highly selective in their decisions to rent rooms to them. See *Roberts*, 468 U.S. at 620. Renting rooms to the public is not an activity protected as an intimate association.

In a further attempt to establish an issue of expressive association, the motel petitioners again rely on their assertion that the motel rooms contain television sets. Putting a television in a motel room does not make the renting of that room an expressive act protected by the Constitution. Petitioners also assert that the associational activities of their patrons are protected by the First Amendment. That may be so, but nothing in the Dallas ordinance regulates the activities of the patrons of motels. It does not affect how long they may stay nor what they may do while they are there. No issue of expressive or intimate association is raised by this case.

The arguments of the motel petitioners do not substantiate any of their asserted constitutional claims. For

this reason, the Court must uphold the adult motel provisions of the ordinance as valid regulations to protect the public health, safety, morals, and general welfare. The regulations are clearly not arbitrary nor unreasonable, but are rationally related to the city's legitimate interest in curbing prostitution and other sex-related crimes. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Shelton v. City of College Station*, 780 F.2d 475, 479 (5th Cir. 1986)(en banc), cert. denied, 477 U.S. 905 (1986) and 479 U.S. 822 (1986).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

OFFICE OF THE CITY ATTORNEY
CITY OF DALLAS, TEXAS

ANALESLIE MUNCY

City Attorney

KENNETH C. DIPPEL

First Assistant City Attorney

Counsel of Record

THOMAS P. BRANDT

Assistant City Attorney

City Hall 7BN

1500 Marilla Street

Dallas, Texas 75201

(214) 670-3510

July 1989



11 8 6
Nos. 87-2012, 87-2051, and 88-49

Supreme Court, U.S.

FILED

JUL 20 1988

BENJAMIN R. SPANGLER, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1988

NO. 87-2012

FW/PBS, INC., et al.,
Petitioners,

v.

CITY OF DALLAS, TEXAS, et al.,
Respondents.

NO. 87-2051

M.J.R., INC., et al.,
Petitioners,

v.

CITY OF DALLAS, TEXAS, et al.,
Respondents.

NO. 88-49

CALVIN BERRY, III, et al.,
Petitioners,

v.

CITY OF DALLAS, TEXAS, et al.,
Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

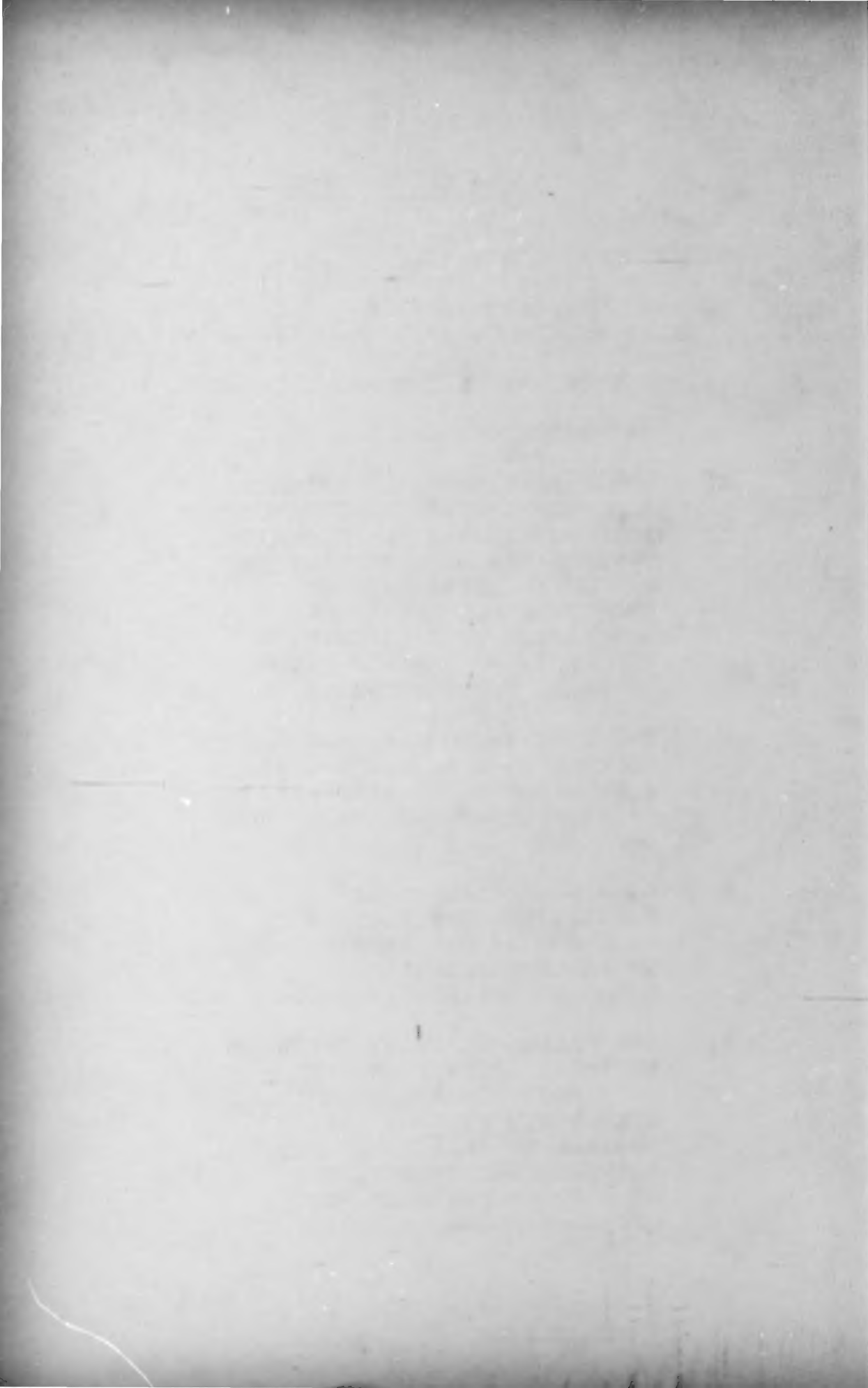
**BRIEF OF AMICUS CURIAE
CHILDREN'S LEGAL FOUNDATION**

**BENJAMIN W. BULL
ALAN E. SEARS
LIN L. MUNSHIL
2845 E. Camelback Rd.
Suite 740
Phoenix, AZ 85016
(602)381-1322**

*Counsel of Record
Amicus Curiae*

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	iii
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.....	vii
INTEREST OF AMICUS CURIAE.....	1
I. INTRODUCTION.....	3
II. THE DALLAS SEXUALLY ORIENTED BUSINESS LICENSE REQUIREMENT DOES NOT IMPOSE AN UNCONSTITUTIONAL PRIOR RESTRAINT ON PROTECTED EXPRESSION BY PROVIDING FOR DENIAL OR REVOCATION OF A LICENSE ON THE BASIS OF CERTAIN PRIOR CRIMINAL CONVICTIONS.....	5
A. The License Requirement is Content-Neutral and Bears a Substantial Relationship to the Purpose of the Ordinance.....	8
B. As a Content-Neutral Regulation, the License Scheme Does Not Result in an Unconstitutional Prior Restraint.....	16
III. THE DALLAS SEXUALLY ORIENTED BUSINESS LICENSE ORDINANCE DOES NOT UNCONSTITUTIONALLY SINGLE OUT PERSONS AND BUSINESSES ENGAGED IN FIRST AMENDMENT ACTIVITIES FOR REGULATION CONTRARY TO ARCARA V. CLOUD BOOKS.....	25



IV. THE ORDINANCE PROVIDES
ADEQUATE PROCEDURAL SAFE-
GUARDS AND IS CONSISTENT
WITH THIS COURT'S DECISIONS.. 31

V. CONCLUSION..... 36

CERTIFICATE OF SERVICE..... 37

THE ORIGINAL DOCUMENT
ALONG WITH THE OTHERS
WAS THIS COURT'S DECISION
IN THE MATTER OF THE
CITY OF NEW YORK
IN THE MATTER OF THE
CITY OF NEW YORK

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>106 Forsyth Corp. v. Bishop,</u> 482 F.2d 280, 281 (5th Cir. 1973).....	14, 18
<u>Airport Bookstore, Inc. v. Jackson,</u> 248 S.E.2d 623 (Ga. 1978).....	18, 30
<u>Arcara v. Cloud Books, Inc.,</u> 478 U.S. 697 (1986).....	17
<u>Bantam Books, Inc. v. Sullivan,</u> 372 U.S. 58 (1963).....	23
<u>Barrago v. City of Louisville,</u> 456 F.Supp. 30, 32 (W.D. Ky. 1978).....	18
<u>Bayside Enterprises, Inc. v.</u> <u>Carson,</u> 470 F.Supp. 1140, 1149 (M.D. Fla. 1979).....	32
<u>Chaplinsky v. New Hampshire,</u> 315 U.S. 568, 571-72 (1942).....	10
<u>City of Paducah v. Investment</u> <u>Entertainment,</u> 791 F.2d 463 (6th Cir. 1986).....	33
<u>City of Renton v. Playtime</u> <u>Theatres,</u> 475 U.S. 41 (1986).....	8
<u>Commonwealth v. Croaton Books,</u> 323 S.E.2d 86, 89 (Va. 1984).....	17
<u>Cox v. Louisiana,</u> 379 U.S. 559 (1965).....	27
<u>De Veau v. Braisted,</u> 363 U.S. 144, 158-59 (1960).....	14

TABLE OF CONTENTS

Page

Chapter

1. General Principles of the Theory of the
2. Structure of the Crystal Lattice
3. The Role of the Crystal Lattice in the

4. Properties of the Crystal Lattice
5. The Role of the Crystal Lattice in the

6. Properties of the Crystal Lattice
7. The Role of the Crystal Lattice in the

8. Properties of the Crystal Lattice
9. The Role of the Crystal Lattice in the

10. Properties of the Crystal Lattice
11. The Role of the Crystal Lattice in the

12. Properties of the Crystal Lattice
13. The Role of the Crystal Lattice in the

14. Properties of the Crystal Lattice
15. The Role of the Crystal Lattice in the

16. Properties of the Crystal Lattice
17. The Role of the Crystal Lattice in the

18. Properties of the Crystal Lattice
19. The Role of the Crystal Lattice in the

20. Properties of the Crystal Lattice
21. The Role of the Crystal Lattice in the

22. Properties of the Crystal Lattice
23. The Role of the Crystal Lattice in the

24. Properties of the Crystal Lattice
25. The Role of the Crystal Lattice in the

26. Properties of the Crystal Lattice
27. The Role of the Crystal Lattice in the

28. Properties of the Crystal Lattice
29. The Role of the Crystal Lattice in the

<u>Dumas v. City of Dallas,</u> 648 F.Supp. 1061, 1082 (N.D. Tex. 1986).....	7
<u>Dun & Bradstreet v. Greenmoss Builders,</u> 472 U.S. 749, 758-9, n.5 (1985)...	10
<u>Entertainment Concepts, Inc. v. Maciejewski,</u> 631 F.2d 497 (7th Cir. 1980).....	33
<u>FCC v. Pacifica Foundation,</u> 438 U.S. 726, 743 (1978).....	10
<u>FW/PBS, Inc. v. City of Dallas,</u> 837 F.2d 1298, 1304 n. 19 (5th Cir. 1988).....	7
<u>Fort Wayne Books, Inc. v. Indiana,</u> U.S. , 103 L.Ed.2d 34, 109 S.Ct. 916 (1989).....	15
<u>Freedman v. Maryland,</u> 380 U.S. 51 (1965).....	11, 23 31
<u>Gateway Books v. Jackson,</u> 441 U.S. 952 (1979).....	18
<u>Genusa v. City of Peoria,</u> 619 F.2d 1203, 1212-13 (7th Cir. 1980).....	6, 13, 29
<u>Grayned v. City of Rockford,</u> 408 U.S. 104 (1972).....	27
<u>Kev, Inc. v. Kitsap County,</u> 793 F.2d 1053, 1060 n. 5 (9th Cir. 1986).....	13, 32
<u>Kingsley Books v. Brown,</u> 354 U.S. 436, 441-42 (1957).....	19

<u>Kovas v. Cooper,</u> 336 U.S. 77 (1948).....	27
<u>NAACP v. Claiborne Hardware,</u> 458 U.S. 886 (1982).....	22
<u>Near v. Minnesota,</u> 283 U.S. 697 (1931).....	20
<u>Nebraska Press Ass'n v. Stewart,</u> 427 U.S. 539 (1976).....	23
<u>New York Times Co. v. Sullivan,</u> 376 U.S. 254, 270 (1964).....	24
<u>New York Times Co. v. United States,</u> 403 U.S. 713 (1971).....	23
<u>O'Day v. King County,</u> 749 P.2d 142 (Wash. 1988).....	30
<u>Organization for a Better Austin v. Keefe,</u> 402 U.S. 415 (1971).....	23
<u>Police Dept., of Chicago v. Mosley,</u> 408 U.S. 92, 95-96 (1972).....	24
<u>SDJ, Inc. v. City of Houston,</u> 636 F.Supp. 1359, 1368 (N.D. Tex. 1986), aff'd 837 F.2d 1268 (5th Cir. 1988).....	30
<u>Schope v. State,</u> 647 S.W.2d 675 (Tex.Civ.App. 1982).....	30
<u>Shuttlesworth v. City of Birmingham,</u> 394 U.S. 147 150-51 (1969).....	6
<u>Southeastern Promotions, Ltd. v. Conrad,</u> 420 U.S. 546 (1975).....	23

<u>State ex rel. Kidwell v. U.S.</u> <u>Marketing, Inc.,</u> 631 P.2d 622 (Idaho 1981).....	25
<u>Tyson & Brother - United Theatre</u> <u>Ticket Offices, Inc. v. Banton,</u> 273 U.S. 418, 430 (1927).....	6
<u>Vance v. Universal Amusement Co.,</u> 445 U.S. 308 (1980).....	22
<u>Virginia Pharmacy Board v.</u> <u>Virginia Citizens Consumer</u> <u>Council, Inc.,</u> 425 U.S. 748, 771 (1976).....	29
<u>Wall Distributors, Inc. v. City</u> <u>of Newport News,</u> 782 F.2d 1165, 1171 (4th Cir. 1986).....	30
<u>Young v. American Mini Theatres,</u> 427 U.S. 50, 62 (1976).....	6

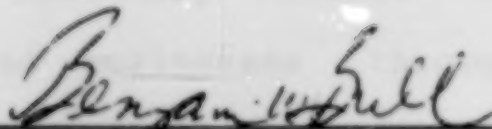
State of New York
County of New York
In SENATE
January 11, 1901
The People of the State of New York,
Represented in Senate and Assembly,
Do hereby certify that
The following is a true and correct
copy of the report of the
Commissioners of the State
Department of Education,
for the year ending June 30, 1900,
as the same appears from the
original report on file in the
Office of the Secretary of State.

MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE

Children's Legal Foundation, Inc.
(CLF), respectfully moves for leave to
file the attached brief amicus curiae.
The consent of the attorney for
Respondents has been obtained. The
consent of the attorney for Petitioner
was requested telephonically. He failed
to respond, so it is assumed that
consent is refused.

The interest of the amicus curiae
is set out below.

Respectfully submitted,



BENJAMIN W. BULL
Counsel for Children's
Legal Foundation

2845 E. Camelback Road
Suite 740
Phoenix, AZ 85016
(602) 381-1322

REPORT FOR THE YEAR 1911
OF THE
UNITED STATES DEPARTMENT OF AGRICULTURE

The following report was prepared by the
Bureau of Plant Industry, under the
direction of the Chief of Bureau, and
under the immediate supervision of the
Assistant Chief of Bureau, and is
presented to the Department for its
information and guidance.

The following report was prepared by the
Bureau of Plant Industry, under the
direction of the Chief of Bureau, and
under the immediate supervision of the
Assistant Chief of Bureau, and is
presented to the Department for its
information and guidance.

The following report was prepared by the
Bureau of Plant Industry, under the
direction of the Chief of Bureau, and
under the immediate supervision of the
Assistant Chief of Bureau, and is
presented to the Department for its
information and guidance.

INTEREST OF AMICUS CURIAE

Children's Legal Foundation, Inc., formerly Citizens for Decency through Law, Inc., is a non-profit legal organization founded in 1957 by attorney Charles H Keating, Jr. Mr. Keating was a member of the 1970 Presidential Commission on Obscenity and Pornography. CLF exists to assist public officials in the enforcement and drafting of constitutional obscenity and pornography laws. It also provides legal assistance to cities and counties seeking to eradicate the "secondary effects" of sexually oriented businesses through zoning ordinances. CLF also provides public information on legal and social issues related to pornography. CLF has a legal staff of attorneys practicing exclusively in the First Amendment area.

REPORT OF THE COMMISSIONER

— THE COMMISSIONER'S REPORT FOR THE YEAR 1900 —

During the year 1900 the Commission has been engaged in a study of the various problems connected with the administration of the public lands. The Commission has held numerous public hearings and has received many suggestions from the public. It has also conducted extensive research into the various problems connected with the administration of the public lands. The Commission has found that the present system of administration is inadequate and that it is necessary to make certain changes in order to improve the efficiency of the system. The Commission has proposed a number of reforms which it believes will result in a more efficient and economical administration of the public lands. These reforms include the reorganization of the various bureaus which are now under the Department of the Interior, the creation of a new Department of the Public Lands, and the establishment of a new system of land management. The Commission believes that these reforms are essential for the proper administration of the public lands and for the protection of the interests of the people.

CLF attorneys assisted in the drafting of the challenged Dallas ordinance, and have drafted numerous other similar ordinances. CLF has filed more than 50 briefs in the United States Supreme Court and has participated in trials and appeals in more than 40 states. It has more than 120 affiliated chapters across the nation representing over 100,000 supporters.

Children's Legal Foundation is profoundly concerned about the ability of communities to regulate illegal conduct and public health hazards created by sexually oriented businesses. It believes that the Dallas ordinance is a constitutional method of combatting these problems, and is necessary to the maintenance of a society where families and children are safe to walk the streets of their cities.

I. INTRODUCTION

A strong First Amendment is perhaps our nation's most vital guarantor of continued liberty. Any legislative incursion into freedom of speech must therefore be closely scrutinized. Nevertheless, the mere invocation of the terms "prior restraint" and "free speech violation" should not settle the issue. This Court must first determine whether speech rights are truly at stake.

Petitioners would like this Court to focus exclusively on the important and grand principles of the First Amendment. Amicus Curiae CLF respectfully suggests that this Court would be better served in directing its attention to the cold, hard, sordid facts relevant to this case. Those facts relate to the harmful secondary effects flowing from the illegal conduct occurring on the premises of sexually

oriented businesses. This type of ordinance is directed at those effects, and not at speech.

The truth is that these sexually oriented establishments are not in the business of communicating ideas, they are in the business of communicating diseases to the community. Their owners do not care about free speech, but about fast cash. They are in the business of catering to the base sexual gratifications of others, for profit. That desire for immediate gratification is what leads "customers" of sexually oriented businesses to engage in dubious, often illegal behavior on the premises.

CLF requests that this Court take a few moments to review the Appendices to this brief, which are transcriptions of videotapes relating to the interior of these establishments. These videotapes

graphically depict the "atmosphere" of a typical sexually oriented business: the male and female prostitutes turning tricks 24 hours per day; the overpowering smell of bodily fluids; the semen, urine and feces on the floors and walls; the anonymous sexual activity occurring through holes in the wall, etc. That is what this case is truly about. For the sake of the community's health, morals, safety and general welfare, these breeding grounds for the transmission of sexual diseases must be closely regulated.

II. THE DALLAS SEXUALLY ORIENTED BUSINESS LICENSE REQUIREMENT DOES NOT IMPOSE AN UNCONSTITUTIONAL PRIOR RESTRAINT ON PROTECTED EXPRESSION BY PROVIDING FOR DENIAL OR REVOCATION OF A LICENSE ON THE BASIS OF CERTAIN PRIOR CRIMINAL CONVICTIONS.

Petitioners assert that the provisions of the Ordinance allowing denial of a license to a person with

certain specified convictions act as an unconstitutional restraint on expression. This contention is without merit.

There is clearly no constitutional impediment to requiring sexually oriented businesses to obtain licenses.¹ The Ordinance denies licenses to persons convicted of certain crimes that are related to the crime-control intent of

¹Young v. American Mini Theatres, 427 U.S. 50, 62 (1976) ("The mere fact that the commercial exploitation of material protected by the First Amendment is subject to . . . licensing requirements is not sufficient reason for invalidating these ordinances"); Shuttlesworth v. City of Birmingham, 394 U.S. 147 150-51 (1969); Tyson & Brother - United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 430 (1927) ("The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power ..."). See also Genusa v. City of Peoria, 619 F.2d 1203, 1212-13 (7th Cir. 1980) (court relied on Young v. American Mini Theatres to uphold license requirement for operation of adult bookstores).

the law.² Individuals convicted of misdemeanors become eligible for a license two years after conviction or end of confinement, whichever is later; and for felonies or multiple misdemeanors the period is five years. FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1305 n.23 (5th Cir. 1988); Dumas v. City of Dallas, 648 F.Supp. 1061 (N.D. Tex. 1986). Petitioners argue that this licensing requirement acts as an unconstitutional prior restraint on the expressive activities of those

²These are prostitution, obscenity, sale, distribution, or display of harmful material to a minor, sexual performance by a child, possession of child pornography, public lewdness, indecent exposure, indecency with a child, sexual assault, aggravated sexual assault, incest, solicitation of a child, and harboring a runaway child. FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1304 n.19 (5th Cir. 1988); Dumas v. City of Dallas, 648 F.Supp. 1061, 1082 (N.D. Tex. 1986).

denied a license for past criminal behavior. This argument is utterly without merit.

A. The License Requirement is Content-Neutral and Bears a Substantial Relationship to the Purpose of the Ordinance.

Like the Renton ordinance in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), the Dallas Ordinance is content-neutral. The Dallas City Council adopted the Ordinance after making a number of factual findings. It found that crime rates are 90% higher in adult districts. The Council concluded that safety required regulation of sexually oriented businesses because they "are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature," and because there had been a substantial number of arrests for sex-related crimes near these

businesses. They also found convincing evidence that these businesses cause "urban blight" and decreased property values. FW/PBS, 837 F.2d at 1301. Indeed the Ordinance recites that its purpose is to "promote health, safety and morals," and to prevent the "continued concentration of sexually oriented businesses." It disclaims any purpose to deny "access by adults to sexually oriented materials protected by the First Amendment." The City also considered studies of other cities regarding the relationship among concentrations of sexually oriented businesses, crime, and property values. In order to prevent increased crime, blighting, and declining property values, the Ordinance was enacted. Id. at 300.

Thus, it is content-neutral in the same way as the Detroit ordinance in

Young v. American Mini Theatres, supra, and the Renton ordinance in City of Renton. These two cases recognize that a city may regulate the effects of sexually oriented businesses without engaging in content-based regulation. They also hold that sexually explicit materials enjoy less First Amendment protection than other kinds of speech. City of Renton, 475 U.S. at 49 n.2, quoting American Mini Theatres, 427 U.S. at 70 (sexually explicit speech is afforded the lowest rung of First Amendment protection).³ And because

³This is consistent with other related cases. Patently offensive references to sexual organs and activities "surely lie at the periphery of First Amendment concern." FCC v. Pacifica Foundation, 438 U.S. 726, 743 (1978); and see Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). More recently, the Court in Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 758-9, n.5 (1985), observed
(Footnote Continued)

the Ordinance, like the City of Renton ordinance, regulates only the "secondary effects" of sexually oriented businesses, it need only meet the standards applicable to time, place, and manner restrictions. It need not comply with more stringent limits on regulation aimed at content of speech such as those discussed in Freedman v. Maryland, 380 U.S. 51 (1965). Like the ordinance in City of Renton, this Court requires only that the Dallas Ordinance be "designed to serve a substantial governmental interest" and allow for "reasonable alternative avenues of communication." City of Renton, 475 U.S. at 50.

(Footnote Continued)

that, "We have long recognized that not all speech is of equal First Amendment importance . . . [c]ertain kinds of speech are less central to the interest of the First Amendment than others..."

Since this Court did not grant a writ of certiorari on the question of whether the Ordinance provides "reasonable alternative avenues of communication," the issue before this Court is whether the licensing scheme is "designed to serve a substantial governmental interest." It clearly does. Like the City of Renton ordinance, the Dallas Ordinance is designed to serve the City's interest in maintaining "the quality of urban life." Id. at 50. This interest is advanced even though the licensing scheme may regulate aspects of the businesses' operations other than location. The kind of speech affected by the Renton license requirement and the city's justification for enforcing it are the same as for the Dallas Ordinance's locational zoning rules. Whether a license is denied because the business

is improperly located or because the business is improperly maintained, the effect is the same -- the operator must refrain from the activity. His only alternative is to comply with the ordinance and obtain a license. Genusa v. City of Peoria, 619 F.2d 1203, 1212 (7th Cir. 1980) (licensing requirements are to be treated under the same analysis as zoning); Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1060 and 1060 n. 5 (licensing requirement for content-neutral nude dancing ordinance tested under "time, place, and manner" analysis). Indeed, the "time, place, and manner" doctrine has never been limited to regulation of "place." FW/PBS, Inc., 837 F.2d at 1304.

The City's findings amply demonstrated a compelling interest in limiting the involvement of specified convicted persons in the operation of

sexually oriented businesses. They documented the strong relationship between sexually-oriented businesses and sexually related crimes. And the City established a compelling justification for barring those prone to such crimes from the management of these businesses.

Moreover, the City's findings are supported by the accepted rule that the government may attach to criminal convictions disabilities aimed at preventing recidivism. See De Veau v. Braisted, 363 U.S. 144, 158-59 (1960) (plurality opinion) ("Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas."); 106 Forsyth Corp. v. Bishop, 482 F.2d 280, 281 (5th Cir. 1973) (per curiam) (holding that the First Amendment permits revocation of theatre license for violation of law against

sexually explicit screenings), cert. denied, 422 U.S. 1044 (1975). Indeed the Supreme Court's recent decision in Fort Wayne Books, Inc. v. Indiana, ___ U.S. ___, 103 L.Ed.2d 34, 109 S.Ct. 916 (1989), reaffirmed this doctrine emphatically. There the Court upheld closure, and forfeiture to the state, of an entire bookstore as punishment for an obscenity conviction. The Court rejected an argument similar to Petitioners' -- that closure of a sexually oriented business as punishment for an obscenity RICO conviction was an unconstitutional prior restraint. The Court held that the restraint on presumptively protected speech activities was not an unconstitutional prior restraint. And see discussion FW/PBS, Inc., 837 F.2d at 1305 (occupational limitations frequently follow criminal conviction, and can

include First Amendment activities such as labor organizing).

The license ineligibility resulting from certain convictions is clearly suitably tailored to achieve the stated purpose of the Ordinance. Ineligibility results only from offenses that are related to the kinds of criminal activity associated with sexually oriented businesses.⁴

B. As a Content-Neutral Regulation, the License Scheme Does Not Result in an Unconstitutional Prior Restraint.

⁴The district court scrutinized the list of crimes that would make an applicant ineligible for a license and invalidated those it found to have no relationship to the purpose of the Ordinance. These offenses include kidnapping, robbery, bribery, controlled substances violations, and "organized criminal activities." Dumas, 648 F.Supp. at 1074.

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

AS THEY ARE ONLY

THE THINGS THAT ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

THESE THINGS ARE NOT TO BE TAKEN TOO SERIOUSLY

Where, as in the instant case, the purpose of the license restriction is unrelated to the incidental prohibition on expressive conduct, no unconstitutional prior restraint occurs. Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986), is squarely on point. There the Court held that a sexually related business could be closed when management was aware of sexual behavior on the premises, in violation of law. Id. at 702. As in the instant case, the criminal conduct was prostitution. The Court made clear that where the purpose of the statute is unrelated to the suppression of speech (i.e., content-neutral), the incidental restraint on expressive conduct is not unconstitutional. And see Commonwealth v. Croaton Books, 323 S.E.2d 86, 89 (Va. 1984) (upheld closure of sexually oriented business based on evidence of

When it is found that the
purpose of the proposed transaction is
to transfer to the transferee the
entire or substantial part of the
transferor's assets, the transfer is

considered a transfer for value.
The purpose of the proposed transaction
is to transfer to the transferee the
entire or substantial part of the
transferor's assets, the transfer is
considered a transfer for value.

The purpose of the proposed transaction
is to transfer to the transferee the
entire or substantial part of the
transferor's assets, the transfer is
considered a transfer for value.

The purpose of the proposed transaction
is to transfer to the transferee the
entire or substantial part of the
transferor's assets, the transfer is
considered a transfer for value.

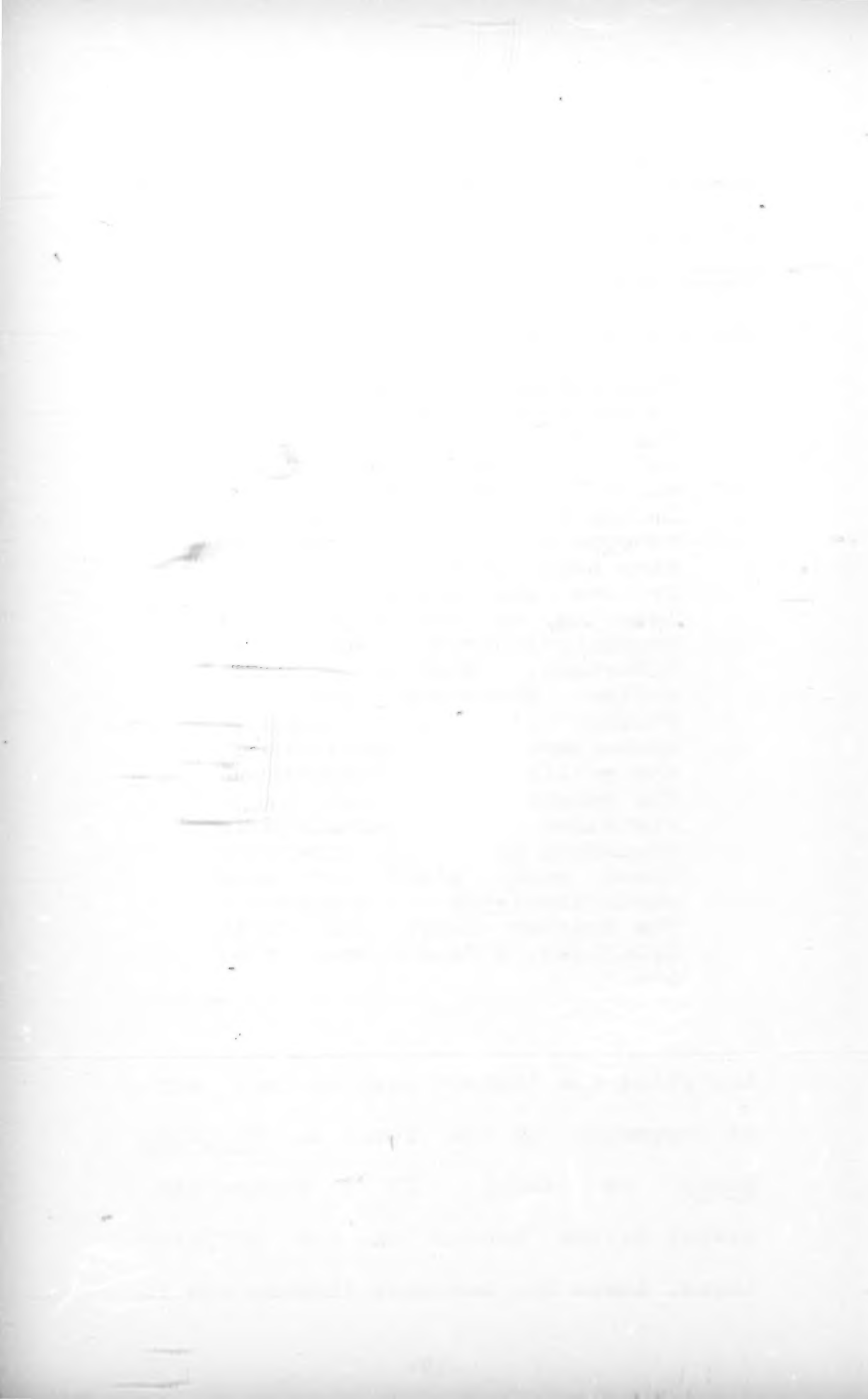
illegal homosexual activity on the premises). If violation of law by a licensee may permissibly justify closure, it follows inescapably that one who has been convicted of a sex-related crime may be denied a license. See 106 Forsyth Corp. v. Bishop, 482 F.2d 280, 281 (5th Cir. 1973), cert. denied, 422 U.S. 1044 (1975); Barrago v. City of Louisville, 456 F.Supp. 30, 32 (W.D. Ky. 1978); Airport Bookstore, Inc. v. Jackson, 248 S.E.2d 623 (Ga. 1978), cert. denied sub. nom. Gateway Books v. Jackson, 441 U.S. 952 (1979). One intent of the Ordinance is to prevent crime; its purpose is not to suppress speech. Incidental impact on expressive conduct is not an unconstitutional prior restraint. Arcara, supra.

Indeed, merely alleging as Petitioner does that something is an unconstitutional prior restraint on free

speech does not advance this Court's inquiry in any meaningful way. As this Court stated in Kingsley Books v. Brown, 354 U.S. 436, 441-42 (1957):

"The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: 'What is needed,' writes Professor Paul A. Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.' The Supreme Court and Civil Liberties, 4 Vand.L.Rev. 533, 539."

Analyzing the instant case in this way, as suggested by the Court in Kingsley Books, is useful. If a bookseller, having fallen behind on his property taxes, loses his business license and is



forced to close his store, it is absurd for him to complain that the city has imposed an unlawful prior restraint upon his bookselling activities. If a bookseller is convicted of the crime of distributing obscene materials, child pornography, or prostitution, he may be imprisoned. But it is absurd for him to argue that his incarceration constitutes a prior restraint on his ability to disseminate protected speech, even though his speech is quite clearly restrained by his inability to operate the bookstore. The same is true in the instant case because the restraint on expressive activities is incidental to, and not the purpose of, the Ordinance. And see Arcara, supra

Contrasting Near v. Minnesota, 283 U.S. 697 (1931), relied on by Petitioners, with the instant statute is instructive. The State of Minnesota had

commenced a statutory nuisance abatement action against Near and his newspaper, alleging it to be "malicious, scandalous and defamatory." After a trial, the district court found that the defendants did regularly publish a malicious, scandalous and defamatory newspaper, and that such newspaper was therefore subject to abatement as a nuisance. The court also perpetually enjoined the defendants "from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law." Id. at 706. The Supreme Court held, of course, that such an injunction constituted an impermissible prior restraint. The Court placed great emphasis on the fact that the object of the Minnesota statute

was to suppress the offending newspaper and to censor the offending publisher.

There are a number of distinctions between the Near case and the instant case, not the least of which is that Near dealt with speech critical of public officials rather than speech of a sexually explicit nature.⁵ Most significantly, however, the Near injunction, as well as the injunction in Vance v. Universal Amusement Co., 445 U.S. 308 (1980), was based on the content of the publication. In the case of license revocation for conviction of a crime or non-payment of taxes, or imprisonment for conviction of a crime,

⁵ Sexually explicit speech is afforded the lowest rung of First Amendment protection. City of Renton, 475 U.S. at 49 n.2; Young v. American Mini Theatres, 427 U.S. at 70. Political speech is on the highest rung. NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

and the appearance of the following

the incidental restraint on future expression is not based on the content of that expression.⁶

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content. . . . The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.'"

⁶The typical prior restraint case deals with the government's effort to censor future expression based on its content. See, e.g., Nebraska Press Ass'n v. Stewart, 427 U.S. 539 (1976); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Freedman v. Maryland, 380 U.S. 51 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

Police Dept., of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972), quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). (Emphasis added, citations omitted.) The Ordinance, including the licensing regulation, is a time, place, and manner statute which is content-neutral. Its purpose is not content control but the elimination of crime, blight, and reduction of property values, which are the secondary effects of sexually oriented businesses. The focus of the statutory measure is on elimination of the secondary effects, unrelated to the content of the sexually explicit speech sold in the businesses. And like closure incidentally resulting from an illegal activity on the premises -- such as prostitution (Arcara, supra) -- the denial of a license to operate because of that conviction is not an unconstitutional prior restraint. Its

purpose is not to suppress speech but to prevent increased criminal behavior in and around sexually oriented businesses. See, e.g., State ex rel. Kidwell v. U.S. Marketing, Inc., 631 P.2d 622 (Idaho 1981), jurisdiction noted 454 U.S. 1140 (1982), appeal dismissed by Appellant U.S. Marketing, Inc., 455 U.S. 1009 (1982).

III. THE DALLAS SEXUALLY ORIENTED BUSINESS LICENSE ORDINANCE DOES NOT UNCONSTITUTIONALLY SINGLE OUT PERSONS AND BUSINESSES ENGAGED IN FIRST AMENDMENT ACTIVITIES FOR REGULATION CONTRARY TO ARCARA V. CLOUD BOOKS

Petitioners argue that because the Ordinance, especially its license provisions, singles out sexually oriented businesses, it is unconstitutional under the First Amendment. Petitioners primarily rely on their own characterization of Justice O'Connor's concurring opinion in Arcara

purpose is not to suppress speech but to
prevent increased criminal behavior in
and around heavily colored communities.
See, e.g., State ex rel. Smith v. G.S.
Magistrate, Inc., 981 P.2d 811 (Neb.
1997); People's Republic of China v. U.S., 112
F.3d 1121 (9th Cir. 1997); People's Republic of China v. U.S., 112
F.3d 1121 (9th Cir. 1997).

III. THE CHINESE GOVERNMENT'S
PURPOSE IS NOT TO SUPPRESS SPEECH BUT
TO PREVENT INCREASED CRIMINAL BEHAVIOR
IN AND AROUND HEAVILY COLORED
COMMUNITIES.

Defendants argue that because the
ordinance, especially "its language
provisions, violate and thereby
violate the First Amendment, the
ordinance is unconstitutional and
should be struck down. The ordinance
is not a content-based restriction on
speech and therefore is subject to
intermediate scrutiny. The ordinance

v. Cloud Books, Inc., supra.
Petitioners' argument is utterly without merit.

This Court has categorically resolved this issue against Petitioner. In Young v. American Mini Theatres, supra, the Court considered whether a classification based on the sexually explicit content of material sold at a certain location passed constitutional muster as a content-neutral time, place, and manner regulation.

"The principle question presented by this case is whether that statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment."

427 U.S. at 52. The Court upheld the classification based upon sexually explicit but protected speech. The Court ruled that "[r]easonable regulations of the time, place, and manner of protected speech, where those

regulations are necessary to further significant governmental interest, are permitted by the First Amendment." Id. at 63 n.18.⁷ In specifically addressing content-based licensing, the Court stated:

"The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and licensing requirements is not a sufficient reason for invalidating these ordinances."

Id. at 62 (emphasis added). The Court specifically held that the content of sexually explicit material could be the basis for separate classification and

⁷The Court cited Kovacs v. Cooper, 336 U.S. 77 (1948) (limitation on use of sound trucks); Cox v. Louisiana, 379 U.S. 559 (1965) (ban on demonstrations in or near a courthouse with the intent to obstruct justice); Grayned v. City of Rockford, 408 U.S. 104 (1972) (ban on willful making, on grounds adjacent to a school, of any noise which disturbs the good order of the school session).

...the ... are ...
...the ... are ...
...the ... are ...
...the ... are ...
...the ... are ...

...the ... are ...
...the ... are ...
...the ... are ...
...the ... are ...
...the ... are ...

...the ... are ...
...the ... are ...
...the ... are ...
...the ... are ...
...the ... are ...

...the ... are ...
...the ... are ...
...the ... are ...
...the ... are ...
...the ... are ...

treatment under a licensing and zoning statute.

"Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."

Id. at 70-71.

"[E]ven though the determination of whether a particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures."

Id. at 71.

In City of Renton, supra, the Court reaffirmed its holding in Young, ruling that a classification based upon the content of sexually explicit material does not violate the Equal Protection Clause. 475 U.S. at 55, n.4. The Court held that this type of classification is

Transcript of the hearing of the

Witness

"I am a member of the
American Society of
the 19th century. I
was born in the year
1850. I am now 70 years
old. I have been a
member of the Society
for 20 years. I have
seen many changes in
the world since I was
born. I have seen the
growth of the United
States from a small
country to a great
power. I have seen the
progress of science and
the arts. I have seen
the development of the
human mind. I have seen
the growth of the
human race. I have seen
the progress of the
world. I have seen the
growth of the human
mind. I have seen the
growth of the human
race. I have seen the
progress of the world.

10-10-10

"I am a member of the
American Society of
the 19th century. I
was born in the year
1850. I am now 70 years
old. I have been a
member of the Society
for 20 years. I have
seen many changes in
the world since I was
born. I have seen the
growth of the United
States from a small
country to a great
power. I have seen the
progress of science and
the arts. I have seen
the development of the
human mind. I have seen
the growth of the
human race. I have seen
the progress of the
world. I have seen the
growth of the human
mind. I have seen the
growth of the human
race. I have seen the
progress of the world.

10-10-10

"I am a member of the
American Society of
the 19th century. I
was born in the year
1850. I am now 70 years
old. I have been a
member of the Society
for 20 years. I have
seen many changes in
the world since I was
born. I have seen the
growth of the United
States from a small
country to a great
power. I have seen the
progress of science and
the arts. I have seen
the development of the
human mind. I have seen
the growth of the
human race. I have seen
the progress of the
world. I have seen the
growth of the human
mind. I have seen the
growth of the human
race. I have seen the
progress of the world.

a valid content-neutral time, place, and manner regulation because it serves a substantial governmental interest and is "justified without reference to the content of the regulated speech." Id. at 48, quoting Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

Lower courts have followed the Supreme Court in upholding licensing of commercial establishments dealing in sexually oriented material. For example, Genusa v. City of Peoria, 619 F.2d 1203, 1212 (7th Cir. 1980), upheld a Peoria license ordinance making "it unlawful for anyone to operate an adult bookstore in Peoria without first obtaining a license." Under a constitutional challenge similar to the instant case, the Seventh Circuit held that "under Young v. American Mini Theatres, Inc., supra, 427 U.S. at

62-63, 96 S.Ct. at 2448, the requirement of a license is also constitutional."

It is rationally related to the goal of "inverse," or scatter zoning of adult uses; it provides both a method for authorities to enforce scatter zoning and means of assuring those who seek to open a new adult use of the legality of the proposed site.

Id. Similarly see Wall Distributors, Inc. v. City of Newport News, 782 F.2d 1165, 1171 (4th Cir. 1986); SDJ, Inc. v. City of Houston, 636 F.Supp. 1359, 1368 (N.D. Tex. 1986), aff'd 837 F.2d 1268 (5th Cir. 1988); O'Day v. King County, 749 P.2d 142 (Wash. 1988); Schope v. State, 647 S.W.2d 675 (Tex.Civ.App. 1982); Airport Bookstore, Inc v. Jackson, 248 S.Ed.2d 623 (Ga. 1978).

Finally, contrary to the contention of Petitioners, the fact that an ordinance applies to businesses of a particular type does not make it a content-based regulation, as this Court

stated in Young and City of Renton. The Ordinance is a valid legislative decision by the City to treat sexually oriented businesses differently because they have "markedly different effects upon their surroundings." Young, 427 U.S. at 82, n.6 (Powell, J., concurring).

IV. THE ORDINANCE PROVIDES ADEQUATE PROCEDURAL SAFEGUARDS AND IS CONSISTENT WITH THIS COURT'S DECISIONS

Petitioners argue that the Ordinance's procedural safeguards are inadequate to prevent the licensing requirements from acting as a prior restraint. This argument is without merit.

Petitioners contend that the Ordinance is governed by and fails to meet the standards of Freedman v. Maryland, 380 U.S. 51 (1965). However, Petitioners' assertion misses the mark

because the Freedman standard does not apply to a content-neutral statute such as the Dallas Ordinance. FW/PBS v. City of Dallas, 837 F.2d at 1303; Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1060 (9th Cir. 1986); Bayside Enterprises, Inc. v. Carson, 470 F.Supp. 1140, 1149 (M.D. Fla. 1979). As noted by the court below, after the City of Renton decision, a content-neutral ordinance which regulates the effects of sexually oriented businesses without engaging in content-based regulation ". . . need only meet the standards applicable to time, place, and manner restrictions and need not comply with Freedman's more stringent limits on regulation aimed at content." FW/PBS, 837 F.2d at 1303.

As discussed previously, First Amendment protection for nonpornographic expression is greater than that afforded sexually explicit speech. City of

Renton, supra; Young, supra. Further, the actual issue here is the effect sexually oriented businesses have on their surroundings, not the content of the sexually explicit speech itself. This is contrasted with Freedman where the only issue was the explicit content of a particular film. What is being addressed here is not a particular movie; rather, it is the detrimental impact on surroundings caused by long-term sexually oriented commercial businesses.

The cases cited by Petitioners in support of their Freedman argument are easily distinguishable. Each of them involves content-based regulations whose only purpose was suppression of speech. The regulations involved in City of Paducah v. Investment Entertainment, 791 F.2d 463 (6th Cir. 1986), cert. denied 93 L.Ed.2d 290 (1986), and Entertainment

Concepts, Inc. v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), cert. denied 450 U.S. 919 (1981), were local obscenity ordinances that called upon a city board to review particular films and make administrative findings of obscenity. In Freedman, the Maryland statute at issue actually required the films to be licensed, and directed the Board of Censors to deny licensure to films deemed "obscene, or such as tended, in the judgment of the Board, to debase or corrupt morals" Freedman v. Maryland, 380 U.S. at 52, n.2. The Dallas Ordinance is not a content-based statute, but is content-neutral and is designed to curb the harmful secondary effects of certain commercial businesses. It is not concerned with the content of expression itself.

Finally, even if this Court should find that the Freedman standard does

apply to content-neutral, time, place, and manner ordinances, the Dallas statutory scheme satisfies Freedman. As the District Court below held:

"The appeal, revocation, and suspension provisions are replete with procedural protections and reviewable standards, and comport with Freedman and fundamental tenets of due process."

Dumas v. City of Dallas, 648 F.Supp. at 1075.

copy of the report, and the
and the report, and the
statistical tables, and the
the statistical tables, and the

The report, and the
statistical tables, and the
statistical tables, and the
statistical tables, and the
statistical tables, and the
statistical tables, and the
statistical tables, and the
statistical tables, and the

copy of the report, and the
and the report, and the

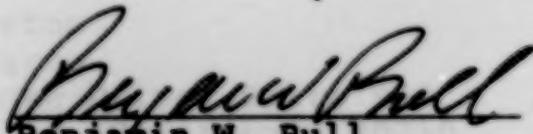
1970

CERTIFICATE OF SERVICE

V. CONCLUSION

For the foregoing reasons, this Court should uphold the Dallas Ordinance licensing provisions in their entirety.

Respectfully submitted,



Benjamin W. Bull
2845 E. Camelback Road
Suite 740
Phoenix, Arizona 85016
(602) 381-1322

Counsel for
Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Amicus Curiae Children's Legal Foundation have been sent by U.S. Mail, Postage Prepaid, on this 20th day of July, 1989, to:

John H. Weston
Weston & Sarno
433 N. Camden Drive, Suite 900
Beverly Hills, California 90210

Richard L. Wilson
902 Lee Road, Suite 30-450
Orlando, Florida 32810-5585

Arthur M. Schwartz, P.C.
Dominion Plaza
600-17th Street, Suite 2250S
Denver, Colorado 80202

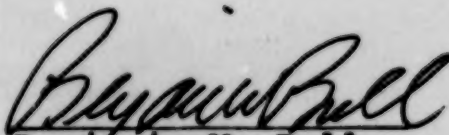
Frank P. Hernandez
5999 Summerside, Suite 101
Dallas, Texas 75252

Attorneys for Petitioners

Analeslie Muncy
Kenneth C. Dippel
Thomas P. Brandt
Office of the City Attorney
7BN City Hall
1500 Marilla Street
Dallas, Texas 75201

Attorneys for Respondent

All parties required to be served
have been served.

A handwritten signature in cursive script, appearing to read "Benjamin W. Bull".

Benjamin W. Bull
Counsel for
Amicus Curiae



APPENDIX A

TRANSCRIPTION OF VIDEOTAPE RELATING TO THE INTERIOR OF SEXUALLY ORIENTED BUSINESSES WITH ALAN SEARS, EXECUTIVE DIRECTOR OF CHILDREN'S LEGAL FOUNDATION AND DET. VINCENT RIZZITELLO, OF THE FT. LAUDERDALE POLICE DEPARTMENT, ORGANIZED CRIME DIVISION. (A copy of this video tape has been lodged with the Clerk of Court.)

Mr. Sears: We have a film that you brought from Florida with us today that we would like to take a quick look at. Vince, I would like you to tell the officers who are listening to this tape, I know there is a real different level of experience between those that are watching this tape, between those who have been deeply involved and who have briefly been involved. I would like you to tell us a little about what goes on in these porn outlets.

Det. Rizzitello: Basically, several years ago in one of our investigations, we got a court order to go inside one of



The first of these is the fact that the
the second is the fact that the
the third is the fact that the
the fourth is the fact that the
the fifth is the fact that the

the sixth is the fact that the
the seventh is the fact that the
the eighth is the fact that the
the ninth is the fact that the
the tenth is the fact that the
the eleventh is the fact that the
the twelfth is the fact that the
the thirteenth is the fact that the
the fourteenth is the fact that the
the fifteenth is the fact that the
the sixteenth is the fact that the
the seventeenth is the fact that the
the eighteenth is the fact that the
the nineteenth is the fact that the
the twentieth is the fact that the

the twenty-first is the fact that the
the twenty-second is the fact that the
the twenty-third is the fact that the
the twenty-fourth is the fact that the
the twenty-fifth is the fact that the

our adult bookstores and video the inside because we could not get a judge to go down and see it for himself so we wanted to represent to him exactly what the atmosphere was like.

What you are seeing now is the back room where the videos are played and the 8 mm movies and this is a marquee section. Basically, it shows films that are offered for viewing in each booth and the customer would go in, you can see there is about 150 films there, decide what film he wanted to view and then go to that particular numbered booth and drop his quarter so he could view about 2 minutes of that film.

Mr. Sears: Now, you have a lot of light in here for your television film. What is the normal situation in these back rooms.

Det. Rizzitello: The way that area was lit up was basically because of our camera that we had. Normally it is a black light atmosphere and you basically have to feel your way around this area. Again, these people knew we were coming so the patrons were removed and it is very sanitary right now. I wish I could bottle the smell or the feeling when you walk in there -- there is just no way of representing it on a piece of tape like this. That is why we wanted the judge to experience it but second best, we got a piece of film that we could have the judge look at and try to interpret it to him basically what these areas are. That they are really masturbation parlors.

Mr. Sears: And in addition to masturbation, other types of sexual activities take place.

Det. Rizzitello: Absolutely, these are the booth's doors, so once you leave the marquee, the patron would find a particular booth he was interested in.

Mr. Sears: This looks like a pretty good size place. What have we got 25 or 26 booths?

Det. Rizzitello: This has 50 booths. This is just one side of it. These booths on this side are mainly smaller booths where maybe one or two people could get in together and on the other side was called the group booths where you get 5 or 6 people. Right now you are looking at a long hallway shot. Normally, this is crowded with individuals going from one booth to the next booth.

Mr. Sears: What is this we are looking at now?

Det. Rizzitello: You are looking at the screen. This is the screen when the customer goes in, he closes the door and the film is shown on the screen. The stains you see on the wall are semen stains, there is no doubt. This is what people do, they go in there and watch a sexually explicit film, they masturbate or they participate in sex with someone else. That is exactly what they are for. These are not for connoisseurs of adult-type films who go in and critique them. This is raw sex.

Mr. Sears: What is this you are pointing to, this writing on the wall?

Det. Rizzitello: This is a normal technique used for advertising for

people to advertise their particular
perversion hoping someone will respond.
Again, the stains on the wall are the
evidence itself on what actually occurs
in these booths. The owners will claim
that all that occurs is movie viewing,
but they are cesspools.



APPENDIX B

Newscenter 13

Eau Claire, Wisconsin

(A copy of this video tape has been lodged with the Clerk of Court.)

Reporter: Tonight on "AIDS In A Small Town" we continue to tell you the story of a man we call Rick. Tonight the story is of a man spreading a virus.

Rick: I will never tell anyone what I have. That is kind of stupid.

Reporter: Why is that?

Rick: It kills your sex life.

Reporter: We have introduced to you a man we are calling Rick. Rick is homosexual, he lives in Eau Claire, and he carries the AIDS virus. What we haven't told you yet is that he claims

to be spreading the virus by having anonymous sex with other men. Does that bother you at all that you are spreading the disease?

Rick: No, I look at it as to the point that in riding in a car. If you get into a car with somebody and there is a seatbelt available to you and you don't use it and you get killed, whose fault is it? To a point I feel a little guilty but I always have condoms and if no one wants to use them or no one suggests it then hey, whose fault is it?

• • •

Harlan Heinz, Psychologist: It is not much different from the killer, the person who goes around murdering people without a conscience. I think that is a similar kind of lack of character

development. I think that that is an exception. Some people who feel that they are going to die in a few years would have this attitude. But I think that's few, I think that's an exception and it is a person without a conscience or without any kind of feeling for the welfare of mankind.

§ § §

Dr. Michael Finkel: Anyone who continues to behave irresponsibly in such matters should have some sort of penalty. There should be some way that we can stop these people.

§ § §

Dr. Ken Alder: This is really distressing. I think that a person who does these things is very definitely a risk to other peoples' health.

Harlan Heinz, Psychologist: It is very difficult to treat a person like this and I think that basically you would not be able to cure this person. This mind would be very difficult to reach.

Reporter: Right now, Wisconsin has no law specifically against the spreading of AIDS. But there could be a law coming very soon.

Gov. Tommy Thompson: I don't know if we want to classify it as a felony but I am certainly looking at some sort of criminal sanctions.

Reporter: Can you get specific at all?

After being subjected to the
difficulties of a long journey
and I think that perhaps the world
is not so much as it seems. This
would be only difficult to read.

However, after the difficulty of
the journey, against the
of the world, the world is
coming very soon.

For the journey, I am sure it
will be difficult to be a journey
certainly, but it is not
a small journey.

Therefore, the journey is not

Gov. Tommy Thompson: We haven't really resolved or made a final decision on it. We are looking at a lot of legislation this year to protect the citizens...

#

Reporter: Rick says if Thompson's administration gets a law approved restricting the spread of AIDS, he will obey it. But until then he will continue his lifestyle and that includes anonymous sex with other men.

Rick: How are you doing that, where all do you have sex?

Rick: Basically, I go to all the bookstores.

Reporter: Eau Claire's adult bookstores show adult movies inside private booths.

One. I say, therefore, to have it really
needed or not a final decision on it.
We are looking for a lot of legislation
this year to handle the situation.

Important. This year is Thompson's
administration year. I am approved
concerning the report of APO. He will
say it. But, I must say he will
continue the investigation and find results
immediately and also other way.

Now we are looking for a way to
to the end of

to the end of

to the end of

Booths no larger than a small closet. But in many of the booths, there are small holes made in the walls. The holes are about waist high off of the floor.

Who do you meet in these rooms?

Rick: I have seen a few married men in there.

Reporter: Do you have most of your sex in adult bookstores?

Rick: Yeah.

Reporter: Is that the easiest way for you to have sex is through these holes?

Rick: Very easy.

#

Another no farther than a small river,
and a part of the harbor, there are
small hills near the water. The
hills are about half a mile off the

front

and no part is above ground

which I have just a few minutes ago
seen.

However, the part near the water
is still in the water.

Which is

reported, in that the water is
not so high as it should be.

Which is

Reporter: You have a hole in one of your booths. Why is that hole there?

Bookstore owner: That hole was there when the booth came down here from Chicago. And it has been there ever since I have had that booth and I have had that booth there since 1984 when they came in here with all that stuff.

Reporter: Glen Peterson runs an adult bookstore in Eau Claire. The hole in one of the booths looks as if a knot of wood was punched out. Peterson said he has tried to block it twice but he has given up because it has been repeatedly removed. Today we told him Rick's story of spreading the virus.

Does that make you want to get rid of the hole more?

Bookstore owner: Yeah. I think that I will make sure I can patch this up good where they can't tear it down again because I don't want to get sued if somebody else catches AIDS over this. So I am going to have to take care of it today, I guess.

Reporter: And although it seems Glen Peterson knows what he is going to do, the City of Eau Claire sure doesn't seem to. City Attorney Ted Fischer says there is no ordinance on the books dealing with the issue at this time, though Milwaukee and St. Paul do. And Councilperson Wally Rogers says it may be up to the Health Board to take action but Health Board President Tom Henry says it might be up to the city to have an ordinance first. We will have more on that as our series continues.

JUL 21 1989

F. SPANIEL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

FW/PBS, INC., *et al.*,
v. *Petitioners,*

CITY OF DALLAS, *et al.*,
Respondents.

M.J.R., INC., *et al.*,
v. *Petitioners,*

CITY OF DALLAS, *et al.*,
Respondents.

CALVIN BERRY, III, *et al.*,
v. *Petitioners,*

CITY OF DALLAS, *et al.*,
Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF OF THE
U.S. CONFERENCE OF MAYORS,
NATIONAL CONFERENCE OF STATE LEGISLATURES,
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
NATIONAL ASSOCIATION OF COUNTIES,
NATIONAL GOVERNORS' ASSOCIATION,
NATIONAL LEAGUE OF CITIES, AND
COUNCIL OF STATE GOVERNMENTS
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

PETER BUSCEMI
MARGARET S. DAILEY
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
STATE AND LOCAL LEGAL
CENTER
444 North Capitol St., N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the
Amici Curiae*

36 p



QUESTIONS PRESENTED

1. Whether a city may preclude persons who recently have been convicted of certain specified sexual offenses from operating a sexually oriented business.
2. Whether a city may impose special regulations on sexually oriented businesses in an effort to alleviate the secondary effects associated with such businesses, such as increased crime and declining property values.
3. Whether the licensing requirements imposed by Dallas on sexually oriented businesses effect an unconstitutional prior restraint.

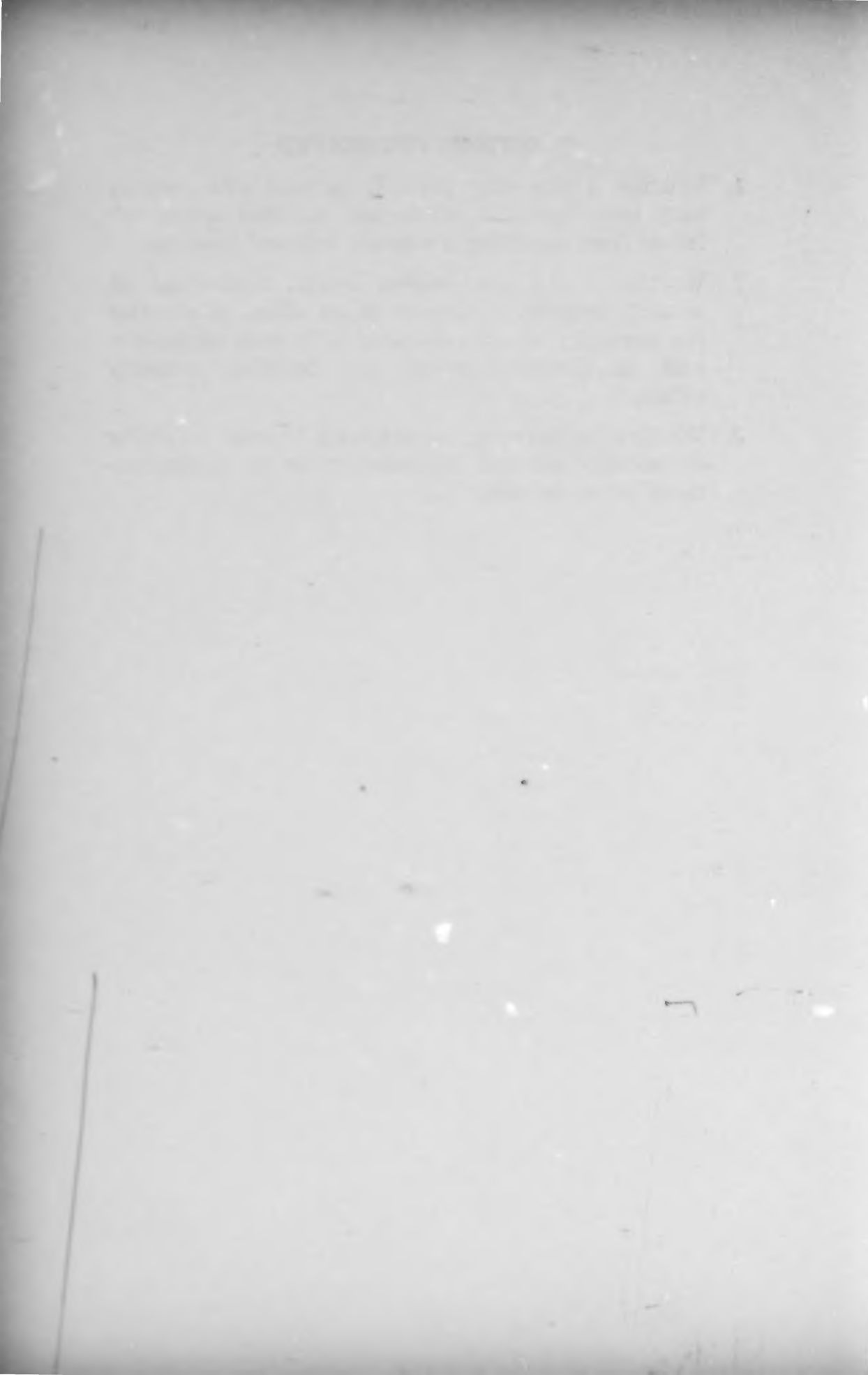


TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE <i>AMICI CURIAE</i>	2
STATEMENT	3
A. Introduction and Description of the Dallas Ordinance	3
B. The Initiation of These Consolidated Actions....	5
C. The District Court's Decision	6
D. The Court of Appeals' Decision	9
E. Proceedings in This Court	12
SUMMARY OF ARGUMENT	13
ARGUMENT	15
I. THE CONSTITUTION DOES NOT CONFER UPON CONVICTED SEX OFFENDERS THE RIGHT TO OPERATE SEXUALLY ORIENTED BUSINESSES	15
A. A City's Broad Police Power To Protect The Health And Safety Of Its Citizens Encompasses The Right To Ban Convicted Criminals From Certain Occupations	16
B. The Principal Concern Of The First Amendment Is The Free Flow Of Expression, Not The Commercial Exploitation Of Sexually Explicit Material By Convicted Criminals....	18
C. The Occupational Disability Created By Chapter 41A Constitutes A Permissible Statutory Discrimination	22

TABLE OF CONTENTS—Continued

	Page
II. CHAPTER 41A DOES NOT IMPERMISSIBLY DISCRIMINATE AGAINST SEXUALLY ORIENTED BUSINESSES	24
III. CHAPTER 41A DOES NOT IMPOSE AN UNCONSTITUTIONAL PRIOR RESTRAINT.....	27
CONCLUSION	30

TABLE OF AUTHORITIES

CASES:	Page
<i>Arcara v. Cloud Books, Inc.</i> , 478 U.S. 697 (1986) ..	26, 29, 30
<i>City of Dallas v. Stanglin</i> , 109 S. Ct. 1591 (1989) ..	26
<i>City of Lakewood v. Plain Dealer Publishing Co.</i> , 108 S. Ct. 2138 (1988)	3, 28
<i>City of Renton v. Playtime Theatres, Inc.</i> , 475 U.S. 41 (1986)	passim
<i>Dandridge v. Williams</i> , 397 U.S. 471 (1970)	22, 23
<i>Dent v. West Virginia</i> , 129 U.S. 114 (1889)	17
<i>De Veau v. Braisted</i> , 363 U.S. 144 (1960)	17
<i>Freedman v. Maryland</i> , 380 U.S. 51 (1965)	9, 10, 11, 28, 30
<i>Hawker v. New York</i> , 170 U.S. 189 (1898)	17, 18, 23
<i>Joseph Burstyn, Inc. v. Wilson</i> , 343 U.S. 495 (1952)	27
<i>Kingsley Books, Inc. v. Brown</i> , 354 U.S. 436 (1957)	27
<i>Lewis v. United States</i> , 445 U.S. 55 (1980)	22
<i>Lovell v. City of Griffin</i> , 303 U.S. 444 (1938)	28
<i>McGowan v. Maryland</i> , 366 U.S. 420 (1961)	22
<i>Minneapolis Star v. Minnesota Comm'r of Reve- nue</i> , 460 U.S. 575 (1983)	26
<i>Near v. Minnesota</i> , 283 U.S. 697 (1931)	30
<i>New York City Transit Authority v. Beazer</i> , 440 U.S. 568 (1979)	17, 23
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	19-20
<i>Railway Express Agency v. New York</i> , 336 U.S. 106 (1949)	24
<i>Richardson v. Ramirez</i> , 418 U.S. 24 (1974)	18
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	26
<i>Roth v. United States</i> , 354 U.S. 476 (1957)	20
<i>State v. State Medical Examining Board</i> , 32 Minn. 324, 20 N.W. 238 (1884)	18
<i>Vance v. Universal Amusement Co.</i> , 445 U.S. 308 (1980)	16
<i>Village of Belle Terre v. Boraas</i> , 416 U.S. 1 (1974)	22

TABLE OF AUTHORITIES—Continued

	Page
<i>Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council</i> , 425 U.S. 748 (1976)	19, 24
<i>Young v. American Mini Theatres, Inc.</i> , 427 U.S. 50 (1976)	passim

**CONSTITUTIONAL PROVISIONS AND
ORDINANCES:**

U.S. Const. Amend. I	passim
U.S. Const. Amend. XIV, Equal Protection Clause	14, 22, 23
Dallas Municipal Code, Chapter 41A	passim

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 87-2012

FW/PBS, INC., *et al.*,
v. *Petitioners,*

CITY OF DALLAS, *et al.*,

Respondents.

No. 87-2051

M.J.R., INC., *et al.*,
v. *Petitioners,*

CITY OF DALLAS, *et al.*,

Respondents.

No. 88-49

CALVIN BERRY, III, *et al.*,
v. *Petitioners,*

CITY OF DALLAS, *et al.*,

Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF OF THE
U.S. CONFERENCE OF MAYORS,
NATIONAL CONFERENCE OF STATE LEGISLATURES,
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
NATIONAL ASSOCIATION OF COUNTIES,
NATIONAL GOVERNORS' ASSOCIATION,
NATIONAL LEAGUE OF CITIES, AND
COUNCIL OF STATE GOVERNMENTS
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

These cases present First Amendment challenges to the validity of a Dallas ordinance imposing licensing requirements on "sexually oriented businesses." The issues presented are important to *amici* and their members because they concern the constitutional limitations on state and local government efforts to protect the morals, health, and safety of their citizens from urban blight and crime.

The Court has previously upheld local government regulation directed at the secondary effects of sexually oriented businesses. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court upheld zoning restrictions aimed at businesses of this character. See also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). The licensing requirements in this case represent another attempt to deal with this pernicious problem.

The licensing requirements at issue in this case, although they differ in character from zoning restrictions, impose no greater restrictions on the ability of creators of sexually oriented material to reach their audience or the ability of the public to obtain access to sexually oriented fare. In fact, in many of their applications, these regulations have considerably less direct impact on First Amendment rights than did the zoning regulation upheld in *Renton*; the Dallas ordinance applies to a wide range of business activities, some of which (*e.g.*, adult motels) are completely unconcerned with freedom of expression.

The City's effort is not to restrain speech, but to exercise some control over businesses engaged in the commercial exploitation of sex, and thus to inhibit the criminal activity and health risks frequently associated

with such exploitation. The licensing requirements may be compared to similar requirements imposed on other lawful business activities (*e.g.*, liquor stores, dance halls, pawn shops) that can attract criminal elements. They are narrowly tailored to the City's strong public interest in mitigating the undesirable secondary effects associated with such businesses, without inhibiting the freedom to publish or receive, and without attempting to regulate the content of, First Amendment communications. The licensing requirements in this case do not vest in any official discretionary power that could result in censorship or suppression of particular First Amendment expression (*cf. City of Lakewood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138 (1988)).

Amici submit that the decision below is correct. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, they submit this brief to assist the Court in its resolution of the issues presented.¹

STATEMENT

A. Introduction and Description of the Dallas Ordinance

These consolidated cases involve several challenges to the constitutionality of a Dallas ordinance that regulates the conduct of sexually oriented businesses. The ordinance, Chapter 41A of the Dallas City Code (reproduced in its current, amended form at J.A. 8-37), defines the term "sexually oriented businesses" to include the following nine kinds of commercial enterprise: (1) adult arcades; (2) adult bookstores or adult video stores; (3) adult cabarets; (4) adult motels; (5) adult motion picture theaters; (6) adult theaters; (7) escort agencies; (8) nude model studios; and (9) sexual encounter centers. Section 41A-2(19) (J.A. 14) and Section 41A-3 (J.A. 15). The ordinance also defines separately each of these kinds of sexually oriented business. Section 41A-2(1)-(6), (9), (12), and (18) (J.A. 9-13).

¹ The parties' letters of consent, pursuant to Rule 36 of the Rules of this Court, have been filed with the Clerk of the Court.

The ordinance requires a license for the operation of sexually oriented businesses and specifically identifies the circumstances in which a license will not be granted. Sections 41A-4 and 41A-5 (J.A. 16-20). The ordinance also limits the locations in which sexually oriented businesses may be conducted (Sections 41A-13 and 41A-14 (J.A. 26-30)), and it establishes particular regulatory requirements for certain kinds of sexually oriented businesses and for the exhibition and display of sexually explicit films, videos, and other materials (Section 41A-15 to 41A-20 (J.A. 30-35)).

The ordinance was originally adopted in June 1986, by unanimous vote of the Dallas City Council, acting on the unanimous recommendation of the Dallas City Plan Commission. Pet. App. 41.² Public comments at a City Council hearing on the Plan Commission's recommendation unanimously favored adoption of the proposed ordinance. *Ibid.*

The purpose of the ordinance is "to promote the health, safety, morals, and general welfare of the citizens of [Dallas], and . . . to prevent the continued concentration of sexually oriented businesses within the city." Section 41A-1(a) (J.A. 8-9). As the legislative history shows, and as the district court found (Pet. App. 42), Dallas sought to "control[] the secondary effects of sexually oriented businesses on surrounding neighborhoods." In addition, the City sought to protect the patrons of such establishments and the citizenry in general from unsanitary and unsafe conditions. Dallas wished to reduce the crime frequently associated with sexually oriented businesses, to deter the spread of urban blight, and to preserve property values. *Id.* at 43. The City Council "did not intend to limit access by adults to sexually oriented material protected by the first amendment." *Ibid.*

² "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 87-2012.

B. The Initiation of These Consolidated Actions

Immediately after the ordinance was adopted, petitioners sued to enjoin its enforcement. Between June 30 and July 17, 1986, three lawsuits were filed in the United States District Court for the Northern District of Texas.

Plaintiffs in the first case, petitioners in No. 87-2012, are numerous corporations and individuals that operate businesses in Dallas selling, exhibiting, or distributing sexually explicit publications, videotapes, or motion picture films. The businesses operated by these petitioners fall within one or more of several of the categories of sexually oriented businesses enumerated in the Dallas ordinance, including adult arcades, adult bookstores or adult video stores, adult motion picture theaters, and adult theaters.

Plaintiffs in the second case, petitioners in No. 87-2051, are corporations that operate "nightclubs" in Dallas where they present "entertainment programs" that consist of "semi-nude dancing." Amended Complaint ¶¶ 1, 9. The businesses operated by these petitioners fall within the "adult cabaret" category of sexually oriented businesses, as defined in the Dallas ordinance. M.J.R. Br. at 2; J.A. 10.

Plaintiffs in the third case, petitioners in No. 88-49, are owners and operators of motels in Dallas that rent their motel rooms for various periods of time, including two-hour increments. The businesses operated by these petitioners fall within the "adult motel" category of sexually oriented businesses, as defined in the Dallas ordinance. Berry Br. at 4; J.A. 10-11.

Petitioners mounted a blunderbuss constitutional challenge to the ordinance, alleging that nearly every provision in Chapter 41A violates one or more of the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments. The complaint in No. 87-2012, for example, contained more than 80 separate paragraphs or subparagraphs that purported to identify various constitutional flaws in part or all of the challenged ordinance. As the

district court observed (Pet. App. 45), however, petitioners' "main attack" focused on the ordinance's zoning restrictions on the location of sexually oriented businesses. Section 41A-13 (J.A. 26-28).

C. The District Court's Decision

The district court disposed of all three complaints on cross-motions for summary judgment (Pet. App. 39-70). The court sustained the validity of the Dallas ordinance, with the exception of four relatively minor provisions that have since been deleted or amended and are not at issue here.

Having reviewed the record of the ordinance's consideration by the City Plan Commission and the City Council, the district court found that "[t]he intent of the City in passing the Ordinance was solely to control the secondary effects of sexually oriented speech on the neighborhoods its purveyors inhabit, rather than to eliminate the speech itself" (Pet. App. 42). The court considered the interests that the ordinance was intended to serve, including "crime control, protection of property values, and prevention of urban blight," and found that those interests are "both important and substantial" (*id.* at 47). The court further found that "[t]he legislative response to the secondary effects of sexually oriented businesses evinced a clear intent to leave alternative avenues open for expression of that genre, while lessening the effects of such businesses on the surrounding community" (*id.* at 47-48).

Based on these findings, and relying on this Court's decisions in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the district court upheld the zoning restrictions in the Dallas ordinance in their entirety. Pet. App. 48-49. The court also found "no constitutional impediment to the concept of requiring sexually oriented businesses to obtain licenses and pay reasonable fees" (*id.* at 50; footnotes omitted).

Turning to the specific features of the Dallas licensing scheme, the district court ruled that the ordinance's license eligibility criteria and licensing procedures are generally valid. Pet. App. 50-55.

In particular, the court upheld the basic concept of Section 41A-5(a)(10) of the ordinance, which makes licenses unavailable, for a specified period of years, to persons who have been convicted of any of an enumerated list of felony or misdemeanor offenses.³ The court said that "denial of licensure to those convicted of certain specified crimes that are related to the crime-control intent of the law is undoubtedly permitted" (Pet. App. 53). The court decided, however, that five of the crimes enumerated in the ordinance as originally adopted were not "sufficiently related to the purpose of the ordinance to withstand scrutiny" (*ibid.*).⁴ The court also ruled that the ordinance could not properly direct that licenses be withheld from persons "under indictment or misdemeanor information" for (but not recently convicted of) any of the enumerated offenses. *Id.* at 53-54, 83. A month after the district

³ The waiting period imposed by the ordinance is five years from conviction or release from confinement for felonies and multiple misdemeanor offenses, and two years from conviction or release from confinement for single misdemeanor offenses. Section 41A-5(a)(10)(B) (J.A. 19-20).

⁴ The enumerated offenses that the court found "clearly related" to the purposes of the ordinance include prostitution; promotion of prostitution; aggravated promotion of prostitution; compelling prostitution; obscenity; sale, distribution, or display of harmful material to a minor; sexual performance by a child; possession of child pornography; public lewdness; indecent exposure; indecency with a child; sexual assault or aggravated sexual assault; incest, solicitation of a child, or harboring a runaway child; and criminal attempt, conspiracy, or solicitation to commit any of the foregoing. Pet. App. 53; J.A. 19.

The five enumerated offenses that the court found "not sufficiently related" to the purposes of the ordinance were "(1) a controlled substance act violation, (2) bribery, (3) robbery, (4) kidnapping, [and] (5) organized criminal activity" (Pet. App. 53; see also *id.* at 107).

court's decision, the Dallas City Council amended the ordinance to delete those portions of Section 41A-5(a) (10) that the court had held invalid. Pet. App. 106-107.

With respect to the procedures established by the ordinance for granting or denying sexually oriented business licenses, the district court held that "the largest part of the licensure section is constitutional" (Pet. App. 52). The court explained that, with two minor exceptions, "[t]he findings the police chief must make in licensing sexually oriented businesses are based on objectively determinable facts, and are thus permissible" (*ibid.*)

The two exceptions to this general conclusion, in the court's view, were Sections 41A-5(a) (8) and 41A-5(c). The first of these provisions required the police chief to deny a license to any applicant who

has been employed in a sexually oriented business in a managerial capacity within the preceding 12 months and *has demonstrated that he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner.*

(Pet. App. 83; emphasis added). The second provision dealt with license applications from persons convicted of one of the specific offenses enumerated in the ordinance. Under Section 41A-5(c), such a person could be granted a license, after the prescribed waiting period following his conviction, but only if the police chief determined that he was "presently fit" to operate a sexually oriented business. The section listed several factors that the police chief was to consider in making his determination of "present fitness."

The district court found that both Section 41A-5(a) (8) and Section 41A-5(c) required the police chief "to make subjective judgments on the fitness of an applicant" (Pet. App. 51), and the court therefore held that the two subsections "vest unfettered discretion in the police chief, and cannot survive constitutional scrutiny" (*id.* at 52). Since the district court's decision, the Dallas City Council has deleted the "present fitness" requirement from Sec-

tion 41A-5(c) and has modified Section 41A-5(a)(8) so as to limit the disqualification based on inability to operate a sexually oriented business "in a peaceful and law-abiding manner" to circumstances in which an applicant's recent operation of such a business has "necessitat[ed] action by law enforcement officers." Pet. App. 106, 108-109; J. A. 18, 20.

Finally, the district court rejected numerous vagueness and overbreadth challenges to the ordinance's definitions of the various categories of sexually oriented businesses and other terms, and the court upheld the ordinance's various restrictions on the "operation, layout, design, and furnishing" of regulated businesses. Pet. App. 55-57.

D. The Court of Appeals' Decision

The court of appeals affirmed the district court's decision. Pet. App. 1-30. The court began by addressing petitioners' contention that the ordinance's licensing requirement is invalid under *Freedman v. Maryland*, 380 U.S. 51 (1965), because of three alleged procedural deficiencies (Pet. App. 5):

it places the burden of proof upon the licensee to prove that a license was wrongfully denied; it fails to provide for prompt determination of the appeal; and it fails to provide assurance of a "prompt final judicial determination."

In rejecting this argument, the court observed that the Dallas ordinance regulates ongoing commercial enterprises, not the content of individual books or films. *Id.* at 8-9. Unlike the state statute invalidated in *Freedman*, which prohibited the exhibition of any motion picture not first submitted to and approved by the State Board of Censors, the Dallas ordinance does not ban the publication, distribution, or exhibition of any film, writing, or other form of expression.

In holding that the Dallas ordinance does not trigger the procedural requirements of *Freedman*, the court of appeals relied heavily on *City of Renton v. Playtime*

Theatres, Inc., 475 U.S. 41 (1986). Pet. App. 7-9. The court observed that the challenged ordinance "regulates only the secondary effects of sexually oriented businesses," and that under *Renton* a city may regulate such secondary effects without engaging in the kind of "content-based" regulation that would activate the procedural safeguards in *Freedman*. *Id.* at 8.

The court of appeals also sustained the zoning restrictions in the Dallas ordinance. The court found that the ordinance furthers a substantial government interest in maintaining the quality of urban life and that the ordinance "allows reasonable alternative avenues of communication" (Pet. App. 9). Under these circumstances, the court had little difficulty in concluding that the Dallas zoning is valid, under the principles enunciated in *Renton*.

The court of appeals next rejected challenges to several specific features of the licensing system established by the ordinance. The court characterized the ordinance's prohibition against granting licenses to persons recently convicted of certain enumerated crimes as "a form of disability commonly attending convictions" (Pet. App. 12), and it found that under the amended ordinance "[i]neligibility results only from offenses that are related to the kinds of criminal activity associated with sexually oriented businesses" (*id.* at 13). Having found that "[t]he relationship between the offense and the evil to be regulated is direct and substantial," the court concluded that the ordinance's mandatory waiting period following an applicant's conviction for an enumerated crime is constitutionally acceptable. *Ibid.*

Similarly, the court of appeals found no constitutional problem with the degree of discretion exercised by the chief of police under the amended ordinance (Pet. App. 13-14); the authorization in Section 41A-7 for police, health, fire, and building inspections of sexually oriented businesses at any time such a business is "occupied or open for business" (*id.* at 14); the requirement in Sec-

tion 41A-19 that viewing booths for films and video cassettes be open to direct view from the manager's station (*id.* at 11); or the classification as an adult motel of any establishment that offers a sleeping room for rent for a period of less than 10 hours (*ibid.*).

Judge Thornberry concurred in part and dissented in part. Pet. App. 17-30. He dissented only with respect to those sexually oriented businesses that, in his view, "directly implicate the First Amendment, such as the adult book stores, adult video stores, and adult motion picture theaters" (*id.* at 17). Even as to these businesses, Judge Thornberry dissented from only three aspects of the majority's decision. Although he agreed with the majority that the Dallas ordinance is "content-neutral" because "it can be justified by a desire to fight crime and urban blight—interests unrelated to the suppression of particular speech" (*id.* at 19-20; see also *id.* at 23), Judge Thornberry nevertheless sought to distinguish the Dallas licensing system from the zoning ordinance upheld in *Renton* (*id.* at 22-23). In his view, "[t]he denial of a license is a complete ban on speech" (*id.* at 23) and "the classic prior restraint" (*id.* at 19). For that reason, he concluded, the licensing ordinance cannot be analyzed as a mere "time, place, and manner restriction," and the procedural protections described in *Freedman* must apply. *Id.* at 18-19, 23-25.

Judge Thornberry also dissented with respect to Section 41A-7's authorization of inspections of sexually oriented businesses and with respect to the requirement in Section 41A-5(a)(6) that applicants for licenses to operate such businesses be approved by the health, fire, and building departments as being in compliance with applicable law. Pet. App. 25-26. He would have held these provisions unconstitutional because, he said, they are applicable only to sexually oriented businesses, not to businesses generally.

Finally, Judge Thornberry would have invalidated Section 41A-5(a)(10), the provision that makes licenses

unavailable for a period of years following an applicant's conviction of any of several enumerated sexual offenses. Pet. App. 27-28. He stated that the burden imposed by this provision is a heavy one and that the restriction should not be permitted in the absence of strong evidence that allowing recently convicted sex offenders to operate sexually oriented businesses would surely result in direct, immediate, and irreparable damage. *Id.* at 28.

E. Proceedings in This Court

After the court of appeals' decision, petitioners moved in this Court for "recall and stay" of the mandate of the court of appeals. It is not at all clear why petitioners wanted a stay of the mandate. Even before the court of appeals' decision, Dallas was free to enforce its amended ordinance, and the court of appeals' decision did not change the status quo. Staying the mandate therefore should have had no practical effect. Nonetheless, petitioners sought this relief, and, on May 4, 1988, the Court stayed the judgment of the court of appeals, "except for its holding that the provisions of the ordinance regulating the location of sexually-oriented businesses do not violate the Federal Constitution" (Pet. App. 38). Although the stay, by its terms, does not seem to limit the City's ability to enforce its ordinance, Dallas appears to have interpreted the stay as an injunction against such enforcement. Since the entry of the stay, therefore, Dallas apparently has enforced only the zoning restrictions, not the licensing provisions, of the disputed ordinance.

In February 1988, this Court granted the petitions for certiorari in all three cases. The Court limited its grant of review so as to exclude those questions in No. 87-2012 and No. 87-2051 that sought to challenge the Dallas zoning restrictions. Pet. App. 7.

SUMMARY OF ARGUMENT

Although their arguments are multifarious, petitioners essentially contend that Chapter 41A violates the First Amendment in three ways. First, petitioners argue that the provisions denying licenses to certain convicted criminals infringe a First Amendment right of those criminals to operate sexually oriented businesses. Second, petitioners argue that Chapter 41A as a whole impermissibly treats sexually oriented businesses differently from other businesses through its special licensing and inspection requirements. Finally, petitioners argue that Chapter 41A effects an unconstitutional "prior restraint" on speech both in requiring licenses and in permitting license denial under the circumstances specified in the ordinance.

I.

Those provisions of the Dallas ordinance that forbid persons recently convicted of certain crimes from operating sexually oriented businesses do not infringe petitioners' First Amendment rights. Chapter 41A was enacted pursuant to the City's police power to regulate for the purpose of protecting and promoting public health and safety. A well-established incident of this police power is the right to bar from certain occupations persons who have committed crimes. Thus, a person responsible for the operation of a sexually oriented business should not have a recent history of committing sex crimes because, as the Dallas City Council found in this case, an individual in such a profession would be faced with repeated opportunities for recidivism.

The First Amendment's principal concern is to protect the freedom to speak and to listen, to read and to write, to express and to receive a broad spectrum of views and messages. The First Amendment is not primarily concerned with protecting the profit-making activities of commercial enterprises. As operators of sexually oriented businesses, petitioners are neither creators nor recipients of expression. They are merely intermediaries, persons

seeking to sell sexually explicit materials or performances. But, for First Amendment purposes, one vendor of such fare is the same as the next. Protected material is amply available in Dallas in sexually oriented businesses not operated by convicted criminals.

Furthermore, there is no record that any individual petitioner has been denied a license to operate because he or she has been convicted of one of the enumerated offenses. And, of course, Chapter 41A does not abridge in any way the First Amendment interest of any person, convicted sex offender or not, to create or to receive sexually explicit fare.

Because the restriction against convicted sex offenders affects those persons exclusively and because it affects only their economic interests, the restriction ought to be analyzed under the Equal Protection Clause of the Fourteenth Amendment, not as an infringement of fundamental rights. The "occupational disability" imposed by the Dallas ordinance is rationally related to the legitimate state interest of protecting public safety. Petitioners themselves do not argue to the contrary.

II.

Chapter 41A does not impermissibly discriminate against sexually oriented businesses by subjecting them to licensing and other requirements. Such businesses are historically, and on this record, associated with crime, including prostitution, and with casual sexual liaisons that implicate the corresponding health risk of sexually transmitted disease. Thus, the requirement of licensing, regulations governing the layout of booths where sexually explicit videos are shown, and the requirement that sexually oriented businesses permit inspection by police, health, and other municipal departments, are all directly related to the peculiar problems and characteristics associated with sexually oriented businesses.

III.

The fact that the Dallas ordinance requires sexually oriented businesses to be licensed and permits applications for such licenses to be denied under specified circumstances does not make Chapter 41A an unconstitutional prior restraint. Impermissible prior restraints fall within one of two categories. Some unconstitutional prior restraints impermissibly vest broad licensing discretion in an official. Others seek to screen protected material, thus allowing censorship. Chapter 41A falls within neither category. No section vests licensing discretion in the licensing official, who is required to issue a license within 30 days if certain objectively ascertainable criteria are met. No section authorizes screening or censorship of sexually oriented speech.

Licenses are denied under Chapter 41A not because of any particular material sold in a sexually oriented business but because of a proprietor's failure to comply with the ordinance. With the exception of the temporary disqualifications applicable to convicted sex offenders, compliance is entirely within the control of the license applicant at the time of application. If an applicant is denied a license, he need only conform to the requirements of Chapter 41A. Accordingly, the procedural requirements mandated when the content of speech or expression is reviewed before publication are not implicated by Chapter 41A.

ARGUMENT

**I. THE CONSTITUTION DOES NOT CONFER UPON
CONVICTED SEX OFFENDERS THE RIGHT TO
OPERATE SEXUALLY ORIENTED BUSINESSES**

Petitioners first challenge the constitutionality of those provisions of the Dallas ordinance that prevent criminals convicted of certain crimes from obtaining licenses to operate sexually oriented businesses.⁵ Petitioners argue

⁵ In addition to Section 41A-5(a)(10), which makes sexually oriented business licenses unavailable to persons recently convicted of any enumerated offense, Section 41-A-10(b)(5) requires that an

that these provisions effect an "absolute ban upon future protected expression" and that the ordinance therefore "bears a 'heavy presumption against its constitutional validity.'" M.J.R. Br. at 34 (*quoting Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 n.13 (1980)); FW/PBS Br. at 12-20. But this argument assumes the answer to the question at issue: whether a person recently convicted of one or more sexual offenses has a First Amendment right to operate a sexually oriented business.

A. A City's Broad Police Power To Protect The Health And Safety Of Its Citizens Encompasses The Right To Ban Convicted Criminals From Certain Occupations

The offenses that temporarily disable certain recently convicted criminals from obtaining licenses are sexual offenses. They include, *inter alia*, sexual assault, prostitution and related offenses, obscenity, and offenses involving child pornography or sexual activity with children. J.A. 18-19.* A person convicted of any of these crimes may not obtain a license to operate a sexually oriented business for five years in the case of a felony or multiple misdemeanors, or two years in the case of a single misdemeanor. *Id.* at 19-20.

The Dallas City Council found that the enumerated sex crimes "render a person unable, incompetent, and unfit" to operate a sexually oriented business "in a manner that would promote the public safety and trust" (Pet. App. 74). The reason is that, as a licensed operator, such a person would be faced with "repeated opportunities" to commit additional offenses. *Id.* at 73. Because this would pose a very real threat to public safety

existing license be revoked if it is determined that the licensee has been convicted of an enumerated offense for which the prescribed waiting period following the conviction has not elapsed. J.A. 23.

* Each of the offenses enumerated in the Dallas ordinance is defined in the Texas Penal Code, the relevant sections of which are cross-referenced in Chapter 41A.

and health, the City Council determined that a temporary disqualification from obtaining a license is desirable. *Id.* at 73-74.

As the City's findings make explicit, the sexually oriented business ordinance was enacted pursuant to the City's police power to regulate certain businesses and professions for the purpose of protecting and promoting public health and safety. Pet. App. 71. A well-established incident of this governmental power is the right to bar from certain occupations or activities persons who have committed certain crimes.

In *Hawker v. New York*, 170 U.S. 189 (1898), for example, this Court upheld New York State's permanent ban against granting physicians' licenses to persons who had committed felonies. In permitting such disqualification, *Hawker* relied directly on "[t]he power of the state to provide for the general welfare of its people." *Id.* at 194 (quoting *Dent v. West Virginia*, 129 U.S. 114, 122 (1889)). The Court found that it was within the State's police power to "prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine." 170 U.S. at 191.⁷

The Dallas City Council found a direct relationship between the enumerated offenses and "the ability, capacity, or fitness required to perform the duties and dis-

⁷ Of course, the legitimate exercise of this aspect of the police power is not restricted to the exclusion of persons from professions involving the provision of health care. This Court has upheld disqualifications of certain classes of persons, including criminals, from other occupations. For example, in *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), the Court sustained the Transit Authority's ban on the employment of drug users, including those on methadone maintenance programs. Similarly, in *De Veau v. Braisted*, 363 U.S. 144 (1960), the Court upheld a New York law disqualifying convicted felons from waterfront union employment. "Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas." *Id.* at 158-59.

charge the responsibilities of the licensed occupation" (Pet. App. 73). The City could reasonably conclude that a person responsible for operating a business focused predominantly on sex should not have a recent history of committing sex crimes. "It cannot be doubted that the legislature has authority, in the exercise of its general police power, to make such reasonable requirements as may be calculated to bar from admission to this profession dishonorable men, whose principles or practices are such as to render them unfit to be trusted with the discharge of its duties.'" *Hawker v. New York*, 170 U.S. at 194 (quoting *State v. State Medical Examining Board*, 32 Minn. 324, 327, 20 N.W. 238, 240 (1884)).⁸ See also *Richardson v. Ramirez*, 418 U.S. 24 (1974) (sustaining one of the many state statutes that deny convicted felons the right to vote).

B. The Principal Concern Of The First Amendment Is The Free Flow Of Expression, Not The Commercial Exploitation Of Sexually Explicit Material By Convicted Criminals

Petitioners' challenge to the licensing restrictions that Dallas imposes on certain convicted criminals does not deny the City's legitimate interest in protecting its citizens or the City's power to do so. Indeed, petitioners seem to acknowledge that the City has a "substantial governmental interest in controlling crime" (FW/PBS Br. at 20). Nevertheless, petitioners contend (*ibid.*), Dallas may not deny licenses to convicted criminals unless the City first shows that direct, immediate, and irreparable damage will result if the ordinance's temporary disqualification is not imposed.

⁸ Notwithstanding petitioners' argument to the contrary (M.J.R. Br. at 23-24, 27-33), this rule is equally applicable when the crime in question is obscenity, rather than a crime that directly threatens the physical safety of the public. Like the other enumerated offenses, the crime of obscenity involves past conduct that the Dallas City Council could reasonably find renders a person unfit to sell sexually explicit material. Certainly, the operation of sexually oriented businesses provides "repeated opportunities" to commit the crime again.

Petitioners try to justify this position by vastly exaggerated assertions of their First Amendment interest in operating sexually oriented businesses. Petitioners repeatedly claim that the ordinance "will result in the absolute suppression of . . . protected First Amendment activity" (*id.* at 23), but they completely ignore the highly tenuous relationship between their commercial enterprises and the core concerns underlying the First Amendment's guarantees. As the courts below recognized, the Dallas ordinance should be evaluated on the basis of a realistic appraisal of its practical effects, not on the basis of petitioners' inflated rhetoric.

While the ordinance has little or no impact on any legitimate First Amendment interest of convicted criminals, it contributes substantially to the City's salutary goals of protecting the health and welfare of the public, reducing crime, and preserving property values. The ordinance imposes no restriction whatever on the right of convicted criminals or members of the public generally to send or receive any message they wish. Neither creators nor consumers of expression are affected. Any tangential First Amendment interest that petitioners may have in the commercial exploitation of sexually explicit materials by convicted criminals cannot displace the City's indisputable substantial interest in regulating sexually oriented businesses for the common good.

The First Amendment was designed to protect the right of a creator to reach his audience. "The central concern of the First Amendment . . . is that there be a free flow from creator to audience of whatever message a film or a book might convey." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 77 (1976) (Powell, J., concurring); see also *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976) ("the protection afforded is to the communication, to its source and to its recipients both"). The constitutional guarantee of free speech "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *New*

York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

Outlets where protected material may be sold and purchased may be necessary for the "free flow of information from creator to audience." It is, however, a giant step from this point to petitioners' premise that all persons, including recently convicted sex offenders, must have an unqualified right to sell all materials arguably entitled to First Amendment protection.

Here, it is uncontested that there are ample outlets in Dallas for persons to purchase sexually explicit books or films or to watch live or filmed performances of similar content. This is therefore not a case about whether certain information or expression may be disseminated. The issue is solely whether persons recently convicted of particular crimes may operate a particular kind of commercial enterprise.

Young v. American Mini Theatres is instructive in this regard. There, the Court sustained an ordinance that forced the relocation of two "adult" movie theatres. The Court rejected the argument that the ordinance created an impermissible restraint on protected communications, noting that "[t]here is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare." 427 U.S. at 62. No such claim exists on this record either.

Petitioners (and the criminals they seek to protect) are neither creators nor consumers of expression. They are intermediaries engaged in the business of selling sexually oriented material, for the sole end of making money. Petitioners, like the adult movie theater operators in *American Mini Theatres*, are nothing more than "commercial purveyors[s]. They do not profess to convey their own personal messages through the movies they show, so that the only communication involved is that contained

in the movies themselves." 427 U.S. at 78 n.2 (Powell, J., concurring).

The First Amendment is not concerned with commercial selling for its own sake.

The inquiry for First Amendment purposes . . . looks only to the effect of this ordinance upon freedom of expression. This prompts essentially two inquiries: (i) Does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom they desire, and (ii) does it restrict in any significant way the viewing of these movies by those who desire to see them? . . . At most the impact of the ordinance on these interests is incidental and minimal.

Young v. American Mini Theatres, 427 U.S. at 78 (Powell, J., concurring). As Justice Powell's opinion makes clear, any significant First Amendment concern with ordinances regulating the commercial distribution of sexually explicit fare must focus on the rights of the creators of such material and their audience. The Dallas ordinance temporarily bars some convicted criminals from operating sexually oriented businesses, but for First Amendment purposes the important point is that sellers are fungible. And there is an ample number of such sellers in Dallas.

By petitioners' own admission (FW/PBS Br. at 6), the only showing on this record is that one out of 165 license applicants was denied a license because of an obscenity conviction, and that denial was reversed by the Permit and License Appeal Board. Two out of 165 applicants had their licenses revoked because of obscenity convictions, and 147 out of 165 license applications were granted. Affidavit of Steven Foster (submitted to this Court as an attachment to the City's response to petitioners' application for stay and recall of mandate).⁹

⁹ Contrary to petitioners' suggestion (FW/PBS Br. at 7), the Foster affidavit does not describe the disposition of the remainder of the 165 license applications.

The Dallas ordinance therefore does not have the effect of suppressing or restricting access to lawful speech. *See Young v. American Mini Theatres*, 427 U.S. at 71 n.35 (plurality opinion). "Viewed as an entity, the market for this commodity is essentially unrestrained." *Id.* at 62 (opinion of the Court).

C. The Occupational Disability Created By Chapter 41A Constitutes A Permissible Statutory Discrimination

Because it affects only former criminals and is imposed because of their particularly demonstrated threat to society, and because it affects not their right to free speech but only their economic interests, the temporary "occupational disability" imposed by Chapter 41A is properly analyzed under the Equal Protection Clause of the Fourteenth Amendment and not as an infringement of fundamental rights.¹⁰

In the areas of economics and social welfare, a classification will be upheld if it has some reasonable basis and if it bears a rational relationship to a permissible state objective. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). "[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). "'A statutory discrimination will not be set aside [under the Equal Protection Clause] if any state of facts reasonably may be conceived to justify it.'" *Dandridge v. Williams*, 397 U.S. at 485 (quoting *McGowan v. Maryland*, 366 U.S. at 426). This standard "has consistently been ap-

¹⁰ Cf. *Lewis v. United States*, 445 U.S. 55, 67 (1980) (characterizing 18 U.S.C. § 1201's prohibition of possession of firearms by felons to be a "civil firearms disability, enforceable by a criminal sanction").

plied to state legislation restricting the availability of employment opportunities." *Dandridge v. Williams*, 397 U.S. at 485. Thus, in *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), this Court upheld, as consonant with the Equal Protection Clause, the New York City Transit Authority's ban on the employment of drug users, including those on a methadone maintenance program.

[T]he "no drugs" policy now enforced by TA is supported by the legitimate inference that as long as a treatment program (or other drug use) continues, a degree of uncertainty persists. Accordingly, an employment policy that postpones eligibility until the treatment program has been completed, rather than accepting an intermediate point on an uncertain line, is rational. It is neither unprincipled nor invidious in the sense that it implies disrespect for the excluded subclass.

Id. at 591-92 (footnote omitted). Similarly, in *Hawker v. New York*, 170 U.S. at 196, the Court found that:

When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character, it is not laying down an arbitrary or fanciful rule, one having no relation to the subject matter, but is only appealing to a well-recognized fact of human experience; and if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the state?

Petitioners do not and could not contend that the provisions of Chapter 41A temporarily disqualifying persons convicted of sexual offenses from operating sexually oriented businesses are not "rationally related" to the legitimate state interest of protecting public safety. The correlation between sexually oriented businesses and an increased incidence of crime is well established, as the

Dallas City Council found. That should be the end of the matter. "It is by . . . practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered." *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949).

II. CHAPTER 41A DOES NOT IMPERMISSIBLY DISCRIMINATE AGAINST SEXUALLY ORIENTED BUSINESSES

Petitioners also argue that Chapter 41A impermissibly treats sexually oriented businesses differently from other businesses, thus allegedly imposing a "content based" restriction on the exercise of First Amendment rights. This Court's recent decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), effectively answers this contention.

In *Renton*, the Court reviewed a zoning ordinance that applied exclusively to adult motion picture theaters. Relying on *Young v. American Mini Theatres*, the Court held that, "at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." 475 U.S. at 49. In the Court's view, even though the ordinance singled out adult theatres for regulation, it was nevertheless appropriate to test the ordinance's validity under a content-neutral standard. The Court explained that "the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are justified without reference to the content of the regulated speech.'" *Id.* at 48 (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. at 771) (emphasis in *Renton*).

The same reasoning applies here. As the Dallas City Council made clear, Chapter 41A was motivated by a desire to regulate the secondary effects of sexually

oriented businesses, not by a desire to muzzle a particular kind of speech. The ordinance's focus on businesses that purvey a certain kind of material therefore does not discriminate impermissibly against a form of expression protected by the First Amendment.

Chapter 41A imposes nothing more than reasonable time, place, and manner restrictions on sexually oriented businesses. With the exception of the temporary disqualification of certain convicted criminals, no ordinance section provides for denial of a license on grounds that cannot be avoided or cured by a license applicant at the time of application. Such "content-neutral" time, place, and manner regulations "are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 47. Chapter 41A satisfies both of these criteria.

As discussed above, Chapter 41A was designed to serve the substantial state interest of protecting public health and safety. Here, as in *Renton* (see 475 U.S. at 51), the City acted on the basis of substantial evidence concerning the adverse secondary effects of sexually oriented businesses. And Chapter 41A leaves open ample alternative avenues of communication. The ordinance does not restrict in any way the number or kind of sexually oriented businesses that may operate. Nor does it attempt to regulate the protected material that may be sold there. Under the standards enunciated in *Renton*, the Dallas ordinance should be sustained.¹¹

¹¹ With respect to petitioners in No. 88-49, operators of "adult motels," the argument that Chapter 41A impermissibly discriminates against sexually oriented businesses fails for an additional and perhaps even more fundamental reason. The regulation of such businesses does not implicate First Amendment concerns at all, and special licensing requirements for motels that rent rooms for periods shorter than ten hours cannot possibly be "content based." Renting a motel room for a two-hour interval is not itself expression, and the fact that people may associate with each other

Petitioners' attempted reliance on *Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), is misplaced. There, the Court "struck down a tax imposed on the sale of large quantities of newsprint and ink because the tax had the effect of singling out newspapers to shoulder its burden." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704 (1986). The Court found the newsprint and ink tax unconstitutional because "differential treatment, unless justified by some special characteristic . . . , suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." 460 U.S. at 585.

Here, although Chapter 41A obviously "singles out" sexually oriented businesses for regulation, the differential treatment imposed by the ordinance upon such businesses is "justified by some special characteristic." It is in fact justified by several "special characteristics" associated with sexually oriented businesses, including increased crime, increased incidence of sexually transmitted disease, diminished property values, and urban blight. Pet. App. 72-73. The affected entities here are businesses historically associated with crime and other adverse secondary effects, not newspapers historically associated with free speech. Significantly, petitioners have not challenged the City Council's findings, based on "convincing documented evidence," that sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution, and for casual sexual liaisons, that "a substantial number of arrests for sexual crimes have been made" in such establishments,

or express themselves inside a motel room does not mean that the City may not legitimately decide that motels that permit short-term rentals require special regulation. The Dallas ordinance imposes no limits on either "intimate association" or "expressive association," as those terms have been used in this Court's recent decisions, and the ordinance's application to adult motels therefore raises no constitutional issue. See *City of Dallas v. Stanglin*, 109 S. Ct. 1591 (1989); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

and that such businesses are associated, among other things, with increased crime. Pet. App. 71-72.

The same rationale also answers petitioners' challenge to the "open booths" section of the ordinance, Section 41A-19 (J.A. 32-35), and the municipal code compliance and administrative inspection sections, Sections 41A-5 (a)(6) and 41A-7 (J.A. 21). As the court of appeals held, "[t]he City could reasonably conclude that closed booths encourage illegal and unsanitary sexual activity in adult theatres." Pet. App. 11. Similarly, the fact that sexually oriented businesses often are open late at night and at odd hours justifies the provision permitting inspections at any time the business is open, rather than only during the hours when most other businesses are open.

III. CHAPTER 41A DOES NOT IMPOSE AN UNCONSTITUTIONAL PRIOR RESTRAINT

Petitioners' briefs are laden with rhetoric regarding the Dallas ordinance's alleged unconstitutional prior restraint on protected speech. The kernel of petitioners' argument is that all laws that require licenses and that permit license denial are presumptively unconstitutional prior restraints. See, e.g., M.J.R. Br. at 10-12, 16, 22.

Petitioners are incorrect. "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957). The Constitution does not require absolute freedom to exhibit protected material at all times and places. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). As the Court held in *Young v. American Mini Theatres*, "[t]he mere fact that the commercial exploitation of material protected by the First Amendment is subject to . . . licensing requirements is not a sufficient reason for invalidating these ordinances." 427 U.S. at 62.

Every one of the cases that petitioners cite regarding unconstitutional prior restraints can be distinguished from this case on one of two grounds. Some unconstitu-

tional prior restraints impermissibly vest broad licensing discretion in an official who has the power unilaterally to revoke or deny a license on bases not articulated in the licensing legislation or not verifiable by reference to objective facts. *E.g.*, *City of Lakewood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138 (1988); *Lovell v. City of Griffin*, 303 U.S. 444 (1938). Other unconstitutional prior restraints require screening and thus threaten to exclude potentially protected material without certain procedural safeguards, such as expeditious judicial review of any such exclusion. *E.g.*, *Freedman v. Maryland*, 380 U.S. 51 (1965). The problems inherent in each of these kinds of prior restraint are absent from Chapter 41A.

The Dallas ordinance does not vest impermissibly broad discretion in any licensing official. Under Section 41A-5, the licensing official is required to approve the issuance of a license within 30 days unless he finds one or more of several objectively ascertainable facts. J.A. 17-20. Similarly, under Section 41A-9 (J.A. 22-23), which governs suspension of licenses, and under Section 41A-10 (J.A. 23-25), which governs license revocation, the licensing official *must* suspend or revoke the license involved if he finds any of the objectively ascertainable ordinance violations specified in those sections.

Petitioners object in particular to Section 41A-5(a) (8), which, as amended after the district court's decision, requires the denial of a license application filed by a person who, while employed in a sexually oriented business during the 12 months before the application, "has demonstrated that he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner, thus necessitating action by law enforcement officers" (J.A. 18). See M.J.R. Br. at 41-42. Petitioners' argument that this provision permits the exercise of unbridled discretion ignores the section's final clause: "thus necessitating action by law enforcement officers."

This language, which was added to Section 41A-5(a) (8) after the district court invalidated the original ver-

sion of that provision, follows the same approach that the City adopted in the original version of the corresponding license suspension provision, Section 41A-9(5), a provision that the district court expressly sustained. Pet. App. 65 n.29. The district court specifically suggested that the excessive discretion found in the original version of Section 41A-5(a)(8) could be cured by amending the provision to require "action by law enforcement officers," as in Section 41A-9(5). Pet. App. 66 n.31. That is exactly what the Dallas City Council did. *Id.* at 106. The resulting provision does not confer unfettered discretion; it is "limited by its language to certain objective indications of an ability to operate a business peacefully" (*id.* at 65 n.29). Petitioners have not identified a single instance of allegedly improper discretionary action under this or any other provision of the ordinance.

Nor is Chapter 41A objectionable as a prior restraint that screens potentially protected speech. In *Arcara v. Cloud Books, Inc.*, an "adult bookstore," where solicitation of prostitution and other forms of illicit sexual activity had been found to have occurred, was closed under a New York nuisance statute. This Court overturned the New York Court of Appeals' finding that the closure order constituted a prior restraint. The Court explained (478 U.S. at 705 n.2) :

The closure order sought in this case differs from a prior restraint in two significant respects. First, the order would impose no restraint at all on the dissemination of particular materials since respondents are free to carry on their bookselling business at another location Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited—indeed, the imposition of the closure order has nothing to do with any expressive conduct at all.

Like the closure order upheld in *Arcara*, Chapter 41A does not prohibit or restrain the dissemination of par-

ticular materials or any materials at all.¹² It follows that any license revocation or denial in Dallas would be based not upon the dissemination of protected materials but upon noncompliance with the provisions of Chapter 41A. That is precisely the kind of situation in which the special procedural requirements outlined in *Freedman v. Maryland*, 380 U.S. 51 (1965), are not implicated.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

PETER BUSCEMI
MARGARET S. DAILEY
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
STATE AND LOCAL LEGAL
CENTER
444 North Capitol St., N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the*
Amici Curiae

July 21, 1989

¹² Petitioners seize upon *Arcara's* observation that "respondents are free to carry on their bookselling business at another location" (emphasis added). Petitioners argue that, as to those convicted criminals who may not operate a sexually oriented business for up to five years, the ordinance clearly effects a prior restraint. FW/PBS Br. at 23; M.J.R. Br. at 23-27. As already discussed, however, and as the quoted language from *Arcara* implies, the First Amendment protects materials offered for sale, not a convicted criminal's right to operate a sexually oriented business. In *Near v. Minnesota*, 283 U.S. 697 (1931), a prior restraint statute forbidding a publisher from issuing future editions of his newspaper both suppressed the newspaper and "put the publisher under an effective censorship." *Id.* at 712. Here, neither publisher nor publication is being suppressed or censored. The Dallas ordinance does not in any way restrict publication by particular persons or the sale of specific materials. The only thing foreclosed is operation of a sexually oriented business by persons recently convicted of certain sexual offenses. Any materials that could be sold by such a person can, of course, also be made available in sexually oriented businesses operated by persons who have not been convicted.